

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [REDACTED] 1964

No. [REDACTED] 48

**UNITED MINE WORKERS OF AMERICA,
PETITIONER,**

vs.

JAMES M. PENNINGTON, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964**

No 927

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FILED

MAR 17 1964

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Joint Appendix

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS
and **LILLIAN GOAD PHILLIPS, Admrx. of the**
Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and
JOSEPHINE ROCHE, as Trustees of the
UNITED MINE WORKERS OF AMERICA WELFARE AND
RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS
and **LILLIAN GOAD PHILLIPS, Admrx. of the**
Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District
Court for the Eastern District of Tennessee, Northern Division

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Interrogatories Propounded to U.M.W.

curity in West Kentucky Coal Company, the copy being unsigned; letter of December 15, 1959, secretary-treasurer to Mr. Harrison Combs; memorandum dated December 30, 1959 for Mr. John Owens, secretary-treasurer; this being introduced as collective Exhibit 53, having been introduced as Exhibit 1-F to Set 2 of the interrogatories.

(Exhibit No. 53 was marked for identification and filed.)

Mr. Combs: Your Honor, these letters he refers to and document are dated respectively December 15, 1959 and December 30, 1959, and we object to their introduction on the ground that they are past the date pertinent here, in addition to other objection.

The Court: On the question of alleged damages in this case, if they have any bearing on the alleged pattern followed by the union and alleged so-called large coal companies, some of them, they may be considered as part of the entire story.

988 Mr. Rowntree: Introduced as Exhibit 54, letter dated March 14, 1960 from Mr. Eaton to John L. Lewis, Thomas Kennedy, John Owens, trustees, International Union.

(Exhibit No. 54 was marked for identification and filed.)

Mr. Kramer: Same objection, your Honor.

The Court: Same ruling.

These matters come subsequent to the date of December 31, 1958. As I understand, Mr. Rowntree, these are offered solely for the purpose of showing that they followed a pattern or alleged pattern that existed during the periods involved in this lawsuit.

Mr. Rowntree: Yes, sir, that particular transaction showed that the United Mine Workers picked up some additional shares of stock in West Kentucky Coal Company.

Mr. Combs: Of course, that is very indefinite, your Honor. I don't think that that is exactly right. We have been talking about three or four instruments here. Certainly all of them didn't apply to West Kentucky Coal Company. Some of the referred documents, and I don't desire to go into

Interrogatories Propounded to U.M.W.

them, but some of them are closing out accounts.

Mr. Rowntree: I said that particular transaction.

989 Mr. Combs: What I mean, you ought to say which one you are talking about. I don't know.

Mr. Rowntree: That last one I said.

Mr. Combs: I might remark that that letter has nothing to do with West Kentucky Coal Company stock. It is not mentioned there.

Mr. Kramer: It has absolutely no reference.

Mr. Rowntree: If I was confused, I beg your Honor's pardon. The document I was making reference to was the document which started off with the note of \$1,006,875, which was immediately before this last one, Exhibit 53, in other words. But the last one was Exhibit 54 and deals with the purchase of utility company stocks by Mr. Eaton and a resale of those stocks to United Mine Workers, coal-consuming utilities.

Mr. Kramer: But, your Honor, none of those utility companies are claimed to be conspirators. They have no charges of being engaged in conspiracy and how some dealings with buying stock, outside of your Honor's previous ruling, buying other stocks on the market, could show anything to indicate a conspiracy — and furthermore,

990 March 14, 1960, 15 months after it is admitted was the end of the conspiracy, we cannot see any evidentiary value at all and move to strike this exhibit, your Honor.

The Court: It might have some bearing on the relationship of Mr. Eaton with the union and the relationship of Mr. Eaton with some of the so-called large coal companies that are charged as being conspirators. It might have some bearing on those matters, Mr. Kramer.

Mr. Rowntree: If your Honor please, for instance, one of those utilities was Cleveland Electric Illuminating Company, of which Mr. Eaton is chairman of the board, or is on the board of directors. Another is the Tampa Electric Company, with respect to which there is some proof in the

Interrogatories Propounded to U.M.W.

record about West Kentucky Coal Company and Peabody Coal Company. Our client shipped some coal to Tampa Electric Company and we will have proof about the competitive sales with respect to some of these utilities. It certainly has a bearing of the tying up of the interests on the other side.

Mr. Kramer: The only thing I care to add to what we have already added, the instrument says "The above transactions are consummated December 29, 1959," and how that sort of transaction of buying stock 15 months after any claim of any violation, and how the letter itself, dated March 14, 1960, we do not see and we continue our objection.

The Court: Same ruling.

Mr. Rowntree: We offer as the next exhibit, as Exhibit 55, note of Chertsey Corporation, January 30, 1958.

Mr. Rowntree: This is in connection with Set No. 2, Exhibit 1-A, not being in the amount of \$2,153,279.50.

(Exhibit No. 55 was marked for identification and filed.)

Mr. Rowntree: As the next exhibit No. 56, note dated an unclear date by Chertsey Corporation in the amount of \$2,625,000, and note of Chertsey Corporation, September 13, 1959, in the amount of \$2,750,000.

(Exhibit No. 56 was marked for identification and filed.)

993 Mr. Rowntree: We offer as next exhibit number 57, note in the amount of \$780,948.93, dated June 3, 1959 —

994 Mr. Rowntree: Also promissory note by Chertsey Corporation, December 3, 1957, for \$517,484.54; and promissory note, February 14, 1958, by Chertsey Corporation, for \$263,464.13.

Mr. Combs: Your Honor, I believe it would be more clear to the Court and the jury if he would mention what stock is involved. Now these last three notes have involved

*Interrogatories Propounded to U.M.W.***Chesapeake and Ohio Railway Stock.**

The Court: All right, will you mention the stock.

Mr. Rowntree: All right.

(Exhibit No. 57 was marked for identification and filed.)

Mr. Rowntree: We introduce as next exhibit, Number 58, previously introduced as Exhibit 1D to Set Three Interrogatories, promissory note involving West Kentucky Coal Company stock dated January 30, 1958, by Sagamore-Summit Company, for \$2,287,809.32.

(Exhibit No. 58 was marked for identification and filed.)

Mr. Rowntree: Offer as next exhibit, promissory notes, one dated September 13, 1959, involving preferred stock of Nashville Coal Company by Sagamore-Summit Coal Company in the amount of \$1,100,000, previously exhibited as 1E to Set Three Interrogatories; and also promissory note dated September 13, 1957, of Sagamore-Summit Company for \$1,050,000, involving preferred stock of Nashville Coal Company.

(Exhibit No. 59 was marked for identification and filed.)

Mr. Rowntree: We offer as next exhibit the note previously exhibited as Exhibit 1F to Set Three Interrogatories dated January 5, 1958, signed by Cyrus S. Eaton for \$2,513,895.18, involving stock of West Kentucky Coal Company.

(Exhibit No. 60 was marked for identification and filed.)

Mr. Rowntree: We next offer as Exhibit 61, the note previously exhibited as Exhibit 1Fa, to Set Three, Interrogatories, promissory note of Tower Industries dated February 5, 1958, in the amount of \$443,223.90, dealing with West Kentucky Coal Company stock.

(Exhibit No. 61 was marked for identification and filed.)

Mr. Rowntree: We next offer as Exhibit 62 note previously exhibited as 1Fb to Set Three Interrogatories dated April 21, 1958, by Tower Industries, Incorporated, in the amount of \$77,938.32, dealing with West Kentucky Coal Company stock.

(Exhibit No. 62 was marked for identification and filed.)

Interrogatories Propounded to U.M.W.

Mr. Rowntree: We offer next as Exhibit 63, note previously exhibited as 1Fc to Set Three Interrogatories dated March 1, 1958, by Tower Industries in the amount of \$18,847.04, dealing with West Kentucky Coal Company stock.

(Exhibit No. 63 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 64, note previously exhibited as 1Fd to Set Three Interrogatories, dated January 26, 1958, by Tower Industries in the amount of \$176,461.07, dealing with West Kentucky Coal Company stock.

(Exhibit No. 64 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 65, note previously exhibited as 1Fe dated March 27, 1958, by Tower Industries in the amount of \$491,430.00 dealing with West Kentucky Coal Company stock.

(Exhibit No. 65 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 66, note of Chertsey Corporation, dated September 18, 1957, or 997 approximately, in the amount of \$550,000.

(Exhibit No. 66 was marked for identification and filed.)

The Court: Who are the Tower Industries?

Mr. Rowntree: That is among several corporations that have their headquarters in the Cleveland Tower in Cleveland, Ohio, amidst the other offices of Mr. Cyrus Eaton. There is a deposition in the record which will bring out the closeness of these corporations. I would say it is a holding company, however its interests are gone into only so far as it pertains to this matter.

The Court: All right.

Mr. Kramer: Now, Your Honor, for the record, and in an effort to shorten an objection with respect to objections that have heretofore been made, with respect to these notes are renewed.

The Court: Yes, sir.

Mr. Kramer: But they must be on a variety of grounds

Deposition of Judge Charles I. Dawson

because of the dates, but those objections are renewed. Will that be accepted without me being more specific?

The Court: Yes, sir.

Mr. Rowntree: We will read the deposition of Judge Charles I. Dawson.

998

— "CHARLES I. DAWSON

called as a witness by counsel for defendants and cross plaintiffs, being first duly sworn, was examined by Mr. Rowntree and stated as follows:

"Q. This is Judge Charles I. Dawson, is that correct?
"A. Yes.

"Q. What is your residence, Judge? "A. I live here in Jefferson County; I live out in the suburbs, outside of town about twelve miles, out at Anchorage, Kentucky.

"Q. That is more than one hundred miles from Knoxville, Tennessee? "A. Well, quite a good deal more than a hundred, yes.

"Q. May I ask your age, Judge? "A. If I live on the 13th day of February next year, I will be eighty years of age.

"Q. You are a lawyer by profession? "A. Yes, sir.

999 "Q. How long have you been practicing law, Judge? "A. Well, I got my license to practice law in the fall of 1905. I had actively practiced law up till I went on the Federal bench—well, I practiced law actively until I became Attorney General of Kentucky in 1920. I resigned as Attorney General in 1923, and went back to the general practice of law. And then in February of 1924, I was appointed United States District Judge for the Western District of Kentucky with headquarters here at Louisville, and I was out of the practice as long as I stayed on the bench. I resigned as Federal Judge effective July 1st, 1935, and I have been actively in the practice all that time till this date.

"Q. And you are a senior partner in one of the largest and oldest firms in Louisville at the present time? "A. Well, I am the senior partner of the firm of Bullitt, Dawson, and

Deposition of Judge Charles I. Dawson

Tarrant, with its various former relations over the years as one of the larger firms, and—

“Q. (Interrupting) And one of the very best? “A. And we like to think one of the very best and largest.

“Q. Do you know, Judge, who succeeded Ezra Van Horn as the Operator's Trustee on the United Mine Workers Welfare and Retirement Board? “A. Yes. I know John L.

Lewis didn't seem to recognize it, though. I was 1000 appointed by the Operators as their representative on the Welfare Board following the resignation of Mr. Van Horn in the latter part of 1949. I think I was selected by the Operators in the early part of November, 1949, as their representative on the Board, and I accepted it, I think, about the 5th day of November, 1949.

“Q. Is that the date you accepted? “A. Let me see for certain. Yes.

“Q. You accepted it on November 5, 1949? “A. 1949, yes.

“Q. Did any representative of the Coal Operators talk to you about your appointment? “A. Yes, sir.

“Q. Who was it, when and where? “A. The first information that I had that I was under consideration by the Operators as the successor of Mr. Van Horn as a representative of the Operators on the Welfare Board was in the form of a telephone conversation from a Mr. Harry Moses, who was the President, as I recall, of the Frick Coal Company, with headquarters at Pittsburgh, Pennsylvania. I have known Mr. Moses for many years, he having at one time been connected with the United States Steel Company's operation in Harlan County, and I at that time and for many years after that time represented the Harlan County Coal Operators Association as their general counsel. However, the mines of the United States Steel Company was 1001 not a member of the association. That mine was a captive mine.

“Q. What was the substance of that 'phone call? “A. He said the operators wanted me to act as their representative on the Board and as Trustee, that Mr. Van Horn, who was

Deposition of Judge Charles I. Dawson

the Trustee, had resigned or was intending to resign, I don't know which, and wanted to know if I would accept appointment as the Operators' representative on the Board. I told him that there were a great many things to be considered. That No. 1, I would not think of accepting the appointment unless I was the unanimous choice of the Operators signatory to the contract with the United Mine Workers who had the authority to select the Operator representative. No. 2, that I would not accept the position unless it was satisfactory to the Harlan County Coal Operators Association, as I represented that organization as their general counsel. And unless it was satisfactory to the Southern Coal Operators Association, when was an organization made up of most of the railroad mines in what was known as the Southern coal area of the United States, and No. 3, that I would have to know something more than he gave me at that time about the duties of the job, how much time I had to give to it, and if it meant that I would have to quit practicing law, and that I would like very much to talk to
1002 some of the prime movers, including Mr. Moses, about the whole situation.

"Q. Did you subsequently talk to them?"

"Q. Judge, did you talk to any of the other prime movers?"

"A. Yes. At that time I was talking to Mr. Harry
1003 Moses, who was president of the Frick Coal Company, and who represented that he was speaking for a group of operators. As a result of that conversation I had a meeting with some of the Pennsylvania operators, and I don't recall all who were there. I know that Mr. Harry Moses was there. I think Mr. Frank Amus, who was an officer and as I understood counsel for the Consolidation Coal Company, was there, and I am quite sure that Mr. George Love was there."

"Q. Will you state the substance of the conversation that you held at that time? "A. I cannot state the substance

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of the conversation. I can state the result of the conversation.

"Q. All-right, sir. "A. The result was that they were earnestly insisting that I take the place, and my decision had to be postponed until I had a chance to contact the Harlan County Coal Operators and Mr. Joe Moody, who was at that time the President of the Southern Coal Operators Association.

"Q. Will you state whether or not these questions that you mentioned that you had in your mind were ironed out to your satisfaction prior to the acceptance on November 5, 1949? "A. Yes, they were. And I found that neither the Harlan County Coal Operators Association nor Southern Coal Operators Association had any objection to me acting as the Operators' representative, but on the contrary were unanimous in their desire that I should act as such. And either on or about the 5th day of November, I think it was 1949, I notified Harry Moses over the telephone that I would accept it."

"Q. Now, Judge, did meetings occur with the Trustees of the Welfare Fund after you accepted the appointment?

"A. Yes, sir.

"Q. Did you make notes and memoranda of what took place at those meetings, and do you have those memoranda available? "A. The first meeting of the Board that I attended was held in the office of the Welfare Fund in Washington, D. C. on November 21st, 1949. There was present at that meeting John L. Lewis, acting as Chairman of the Board, Miss Josephine Roche, who had some position on the Board — let me see if I can find out what it is — she seemed to be the chief administrator of the Fund, and Senator Styles Bridges, who was United States Senator from the State of New Hampshire, and who had been selected by Mr. Van Horn and Mr. John L. Lewis in 1947 as the public representative on the Board.

"Q. When you say public representative, is that the

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same as neutral representative? "A. Yes. I can't refer you to any minutes that were made at that Board meeting about what took place because Mr. Lewis instructed the Secretary of the meeting to make no record of motions made by me, and announced that he would not recognize me as a member of the Board. As soon as I returned to my home here in Louisville following that meeting I wrote out in detail what took place at that meeting while the matter was fresh in my mind, and I am prepared to swear and do swear that the memorandum which I then made correctly and in detail stated what took place at that meeting. I have before me now a carbon copy of the original of that memorandum made up of thirteen and about a half pages, and it is headed, 'Narrative of the Meeting of the Trustee United Mine Workers of America Welfare & Retirement Fund held at the office of the Fund, 905 Fifteenth Street, N.W., in Washington, D. C., on Monday, November 21, 1949 at 11 A. M. Central Standard Time.' I show you that statement, if you desire. And I can't spare this one, but I show you gentlemen the original of it. I put a memorandum recently on it of Mr. Rountree's address that wasn't on there until a few days ago."

* * * * *

1006 Mr. Kramer: Your Honor, may I suggest a correction in this record back on page 9 of this deposition. There is evidently a typographical error there. The word "mutual" is used and it should be "neutral".

Mr. Robertson: And I read it into the record as "neutral".

Mr. Kramer: But in the answer, I think the answer took the word "mutual"—but it is "neutral".

You skip to where?

Mr. Robertson: Skip to Question 25 on page 11.

(The reading of the deposition was continued.)

"Q. Now, Judge, was another meeting held after that first meeting? "A. Yes, sir.

"Q. When was that? "A. It was held on December the

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2nd, 1949, at the same place—on Friday, December 2nd, 1949.

“Q. And who was present at that meeting?” “A. The same parties were present as were present at the first meeting. In my previous answer I stated as present Mr. John L. Lewis, Senator Styles Bridges, Miss Josephine 1007 Roche, and myself. I neglected to state that Mr. Mitch, I don't know his given name, attorney for the Fund, was also present.

“Q. Now, did you make memoranda of this meeting similar to the way you did the first one?” “A. Yes.

“Q. Will you state whether or not Mr. Lewis' position with respect to recognition of you as a Trustee on the minutes was the same as the first meeting?” “A. Yes. Except more emphatic.

“Q. Do you have a copy of your memorandum?

1008 “A. Yes, sir. Inasmuch as Mr. Lewis refused to recognize me as a member of the Board of Trustees, refused to put any motion I made and refused to have my vote counted on any matter that came up, and because of that fact * * * as soon as I got back to Louisville, which was the following day as I recall, I sat down and did the same thing as I did in respect to the meeting of November 21st, 1949. I dictated to my stenographer a full and complete statement of what took place, and that was transcribed, and I have before me now a copy of what I dictated in respect of what took place at that December the 2nd, 1949 meeting, and I am prepared to say and do say that that statement truthfully reflects that actually took place on that date. The stenographer in transcribing my dictation in the heading showed that the meeting was held ‘on Friday 2, 1949, at 11 A. M. Central Standard Time’. It should have 1009 been Friday, December 2, 1949. And I have noted that fact in pencil in the heading of the statement.

“Q. Judge, will you state whether or not at the time these memoranda were prepared, and also recently in prep-

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aration for this deposition, did you read these over and do they correctly set forth what transpired at the meetings?

"A. Yes. And I might add furthermore that a copy of each of these statements was furnished to Mr. Moses and I think to Mr. Love.

"Q. Mr. George Love? "A. Yes, sir.

"Q. At what time? "A. Shortly after they were —

"Q. After they were prepared? "A. Yes."

Mr. Robertson: Your Honor, we come to this second memorandum, and here again we will not put this entire memorandum in; however, we do want to read into the record the two telegrams which are contained in that memorandum which telegrams Mr. Lewis was shown in the memorandum. I believe in the reading yesterday he verified them as being correct.

1010 Mr. Robertson: The first telegram is dated November 14, 1949. It is addressed to Ezra Van Horn, Rockefeller Building, Cleveland. It states:

"Truman E. Johnson, Secretary, Operators' Negotiating Committee National Bituminous Wage Agreement 1948, Address, Fairmont, West Virginia, on date of November 3, 1949 in communication to Trustees, United Mine Workers of America Welfare and Retirement Fund, avers that Judge Charles I. Dawson of Louisville Kentucky is certified by 51% of the tonnage signature to the contract as the successor trustee to yourself, resigned. Do you confirm resignation and validity of action of parties represented by Truman E. Johnson? Will you advise."

Signed John L. Lewis, Chairman Trustees United Mine Workers of America Welfare and Retirement Fund.

The second telegram is addressed to Mr. John L. Lewis, Chairman, Trustees, U. M. W. of A. Welfare & Retirement Fund, 907 Fifteenth Street, N.W., Washington, D. C., and I quote:

"Retel of November 16 I again confirm my resignation of September 14 as Trustee of UMW of A Welfare and Re-

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tirement Fund. I will not be present at the meeting of the Trustees on Monday morning at 10:00 o'clock, November 21. I am notifying Judge Charles I. Dawson of this meeting who has been appointed by the coal operators as my successor according to the information I have received. I have no doubt that this appointment has been made in a proper manner and that Judge Dawson is a member of said Board. Sending a copy of your wire and this wire to Senator Bridges and Judge Dawson."

From Ezra Van Horn.

Begin with Question 36 on top of page 14.

(The reading of the deposition was continued.)

"Q. Judge, did you consult with Mr. Love and Mr. Moses with respect to the difficulties you were having in these meetings? "A. Oh, yes, they knew all about what was happening. And I might say that Mr. Moses, and I think Mr. Love, were insisting that I take action to compel the resignation of me as the Operators' representative, and I did take such action."

1012 "Mr. Rowntree: It is stipulated by and between counsel for parties that under docket number 5374-49 Judge Dawson filed a suit in the United States District Court for the District of Columbia resulting from the action which took place at the two meetings previously testified about."

"Q. Now, Judge, when the National Bituminous Coal Wage Agreement of 1950 was signed, will you state whether or not you were named as Trustee by the Operators in that contract? "A. No, sir, I was not. A man by the name of Owens was named.

"Q. Is that Charles Owens? "A. Yes. And I might say, as I recall, that contract at that time was not signed by the Harlan County Coal Operators at all. It was signed by the Northern and Eastern Operators,

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and I was left out and not named as the representative of the Operators, and Mr. Owens was named."

The Court: What is the date of that contract?

Mr. Robertson: That was the 1950 contract. I believe it is March 5, 1950.

(The reading of the deposition was continued.)

"And of that action I had absolutely no prior notice from Mr. Love or from Mr. Moses or from Mr. Amos, or any of the other crowd that was active in making that contract."

Mr. Robertson: Your Honor, just for purposes of clarification, this Mr. Charles Owens was one of the original plaintiffs in this suit, I believe.

Mr. Kramer: That is right, and he died and he was replaced.

Mr. Robertson: Replaced by Mr. Schmidt.

(The reading of the deposition was continued.)

"Q. Had you notified Mr. Love and Mr. Moses of the commencement of the lawsuit which you had started? "A. I don't recall whether I notified Mr. Love specifically. I know I notified Mr. Moses. And I know that Mr. Love and Mr. Moses were right there in the same building and in close contact with each other.

1024 "Q. Will you state whether or not through this period of time the negotiations over the 1950 contract were going on from time to time? "A. I knew absolutely nothing about the negotiations."

"A. I knew absolutely nothing about the negotiations. I didn't even know that the contract was up for negotiation. I finally learned that that contract —"

"A. That contract on its face as disclosed by a copy which I have got, I don't know how I got it, was made as of the 5th day of March, 1950.

"Q. I think a copy of that is already in the record, Judge. What happened for the lawsuit? "A. Well, after I was eliminated as Trustee I took the position there wasn't any

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reason for my continuing with a lawsuit for people — fighting a lawsuit for people who had proven themselves as treacherous as these operators had proven themselves to be, and I got permission from them to dismiss the 1015 suit.”

Mr. Robertson: This is all of the direct examination we wish to read. We would like to read the cross examination by Mr. Kramer, if that is agreeable.

Mr. Kramer: Go ahead.

I except to the part we desire to object to, your Honor. This was discovery, your Honor.

Mr. Roberts: Page 19, question No. 47.

(The reading of the desposition was continued.)

“CROSS EXAMINATION

By Mr. Kramer:

“Q. Judge Dawson, when you were approached and agreed to serve as one of the Trustees of the United Mine Workers Welfare & Retirement Fund, were you approached and agreed to accept the appointment or designation as a lawyer for the Operators? “A. I was a lawyer for the Harlan County Coal Operators Association, which was made up of the principal commercial railroad mines in Harlan County and Bell County, and in Knox County and Whitley County, Kentucky.

“Q. And were you accepting the appointment or designation as the attorney for those Operators? “A. I was accepting the appointment as the Mine Operators’ representative on that Trustee Board which the contract specifically provided for. That contract, as you are well aware, 1016 provided that the United Mine Workers should have a representative on that Board, and that was named as John L. Lewis, and that the Operators should have a representative on that Board selected by them, and that they should have by agreement a so-called neutral member. And at that time that I had been talking about Senator

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Styles Bridges was the neutral member. I don't know if he is still or not.

"Q. As I recall the contract there was no provision therein with reference to the compensation to be paid those Trustees. What arrangements did you have for compensation as functioning as a Trustee? "A. It was distinctly understood with the coal operators who placed me on that trusteeship that they were paying all the money into the Fund, that the miners paid no part of it, and that they had a vital interest in seeing that that fund was administered for the purposes for which it was purportedly created. They realized that and openly stated so, that if there was —"

Mr. Robertson: That is supposed to be "not".

Mr. Kramer: From there it is a voluntary statement not responsive to the question; and we object to the introduction of the remainder of this so-called answer.

Mr. Robertson: Your Honor, our position is that 1017 it is extremely responsive to it.

(Court looked at deposition.)

The Court: Well, this is just a long statement of the views of the judge. Mr. Lewis put his views in the record, Mr. Kramer. Why not the views —

Mr. Kramer: Because Mr. Lewis is a party to the contract, and Mr. Dawson, if your Honor looks on down, we objected at the time that Mr. Dawson's answer was not responsive to the question at all. The question was simply this — we didn't ask him for his views. The question was with reference to the compensation. Now he starts into his understanding of what the operators thought and so on. We asked no question of that sort at all. It is a mere voluntary statement.

The Court: I will let you read that part where it refers to the small operators. Those observations that he makes about Mr. Lewis, just leave them out.

It is a contest between him and Mr. Lewis. They didn't view things alike, and there is no use to put that in. I will let you read what he said about these little operators.

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You and Mr. Kramer can agree there what it is. Just so you don't bring in what he said about Mr. Lewis.

1018 (The reading of the deposition continued.)

"That I wanted the compensation I received to be paid by the people who employed me and who selected me, and I told them that I would not accept compensation from the Welfare Fund itself, that I did not think that anyone except the neutral member had any right to accept compensation from the Fund, because the other two members were representing specific definite interests."

"Q. Was the amount of compensation agreed upon by you and the Operators before the meeting of either November the 21st or December the 2nd?

1019 "A. I wouldn't say that there was a specific definite contract before that, except to this extent, before I accepted I ascertained that Senator Styles Bridges, the neutral member, was drawing \$35,000 a year, I think it was, and that my compensation would be comparable to that. And I proceeded throughout the time that I was trying to act as Trustee with the thought that that would be what I would receive."

Mr. Rowntree: If your Honor please, for the judge's protection, I think it should be understood that he was not expecting any compensation from the Welfare Fund.

Mr. Kramer: That is just what he read.

Mr. Rowntree: I want it clearly understood, be-
1020 cause we have eliminated part of his answer in respect to that and I don't want to prejudice the judge.

1021 "Q. Was there later some dispute between you and the Operators which resulted in litigation over the amount of compensation which you were paid? "A. No, sir.

"Q. No dispute at all? "A. No, sir.

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"Q. And were you paid compensation? "A. Yes, sir. I was not paid the full \$35,000 though, because some of the operators wouldn't put up after the thing blew up, but I got substantially that.

"Q. But there was no litigation about it? "A. No, sir, no litigation or no ill feeling. There never has been any ill feeling only against the fellows.

1022 "Q. Now, there has been some testimony about a lawsuit you instituted in the United States District Court at Washington, and then later a non-suit was taken. And, of course, in a non-suit, as I understand, the costs are taxed against the plaintiff. What happened in that lawsuit? "A. That I don't know. That is easily ascertained. Mr. John Wilson, an attorney in Washington, handled the details of that.

"Q. You didn't personally pay the costs, though? "A. No, sir.

"Q. And you didn't personally pay Mr. John Wilson the attorney's fee that was paid for that? "A. No, sir. The Operators paid that. I might say he was employed on authority from the Operators that I represented given in advance before the suit was filed."

1023 Mr. Rowntree: Deposition of George H. Love, a witness called by the defendants and cross-plaintiffs, at Pittsburgh, Pennsylvania, November 29, 1960.

"GEORGE H. LOVE

"By Mr. Rowntree:

"Q. What is your name, sir? "A. George H. Love.

"Q. Where do you reside, Mr. Love? "A. Pitts-
1024 burgh, Pennsylvania.

"Q. What position do you hold? "A. I am Chairman of the Board of Consolidation Coal Company.

"Q. How long have you held that position? "A. I believe I became Chairman at the end of '56 or the very beginning of 1957.

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“Q. What was your office before that? “A. President.

“Q. And how long had you been president? “A. This company was formed the very end of 1945, and from that time on, I have been president.

“Q. Do you hold any office in any coal association made up of coal operators in the United States? “A. Made up exclusively of coal operators?

“Q. Not exclusively, but largely, the membership consisting large of coal operators?

“The Witness: I have no connection with National Coal Association, for example. That’s the main coal association.

“By Mr. Rowntree:

1025 “Q. Does Consolidation Coal Company have a membership in National Coal Association? “A. Yes.

“By Mr. Rowntree:

“Q. Mr. Love, I show you Consolidation Coal Company statement found in Moody’s Industrial Manual for 1960, and I would like to ask that you have that checked, and any corrections that are to be made to that statement, that they be submitted to the court reporter.”

Mr. Rowntree: That statement was exhibited as Exhibit One and we would like to read excerpts from that statement.

Mr. Kramer: Now, Your Honor, there was an objection made at the time, and I want to repeat the objection.

Mr. Rowntree:

The list of corrections was submitted to the court reporter and is attached to the original exhibit, original deposition.

1034 The Court: All right. So long as you follow the check list which the witness filed, or caused to be filed with the court reporter, and which he verified, I hold
1035 it is competent. But I hold that any information that

Deposition of George H. Love

has not been checked or approved by him is not competent at this time.

Mr. Rowntree: And we will confine it to the period prior to 1959.

The Court: All right.

Mr. Rowntree: Incorporated in Pennsylvania January 12, 1916 as Pittsburgh Coal Company, by merger of Pittsburgh Coal Company of Pennsylvania and The Monongahela River Consolidated Coal & Coke Company. Name changed to Pittsburgh Consolidation Coal Company, November 23, 1945, present name adopted in April, 1958.

Skipping to: In 1952 acquired the remaining 51 per cent interest in Jefferson Coal Company, which company was then liquidated and its mines and properties located in Ohio are operated as part of Hanna Coal Company Division.

1036 The Court: Mr. Rowntree, what coal company are you talking about?

Mr. Rowntree: Consolidation Coal Company.

The Court: All right.

Mr. Rowntree: On September 30, 1954 company acquired entire capital stock of — and that is corrected. That is corrected, Jamison Coal and Coke Company.

On December 3, 1956, acquisition of Pocahontas Fuel Company was declared effective. Pocahontas was liquidated, now operated as a division.

Consolidation Coal Company merged — that is outside the period.

Affiliates: I am just reading what we can put into the period here, your Honor.

The Court: That is right.

Mr. Rowntree: Mathies Coal Company organized in 1951 and purchased from Pittsburgh Consolidation Coal — Mathies Coal Company organized in 1951 and purchased from Pittsburgh Consolidation Coal. Its Mathies mine together with certain coal and surface lands, including 3,675 acres of Pittsburgh Seam coal for \$15,000,000 cash and

Deposition of George H. Love

\$4,300,000 mortgage payable over 15-year period, and
1037 also leases 19,000 acres Pittsburgh Seam coal land
from Pittsburgh Consolidation Coal.

Harmar Coal Company: Formed in June, 1952 and purchased the Harmar and Oakmont mines. Also leased 7,000 acres. Properties are supervised by Consolidation Coal Company which owns 25 per cent interest.

Well now counsel has raised the question about the period of 1959 being beyond the period of the case, so that would technically eliminate the statement of the business and products which necessarily was made as of 1959, and actually, that was the main purpose of our putting it in.

There is left, however, the schedule of production over the years which are designated.

Net tons production; total coal sold.

1955, 40,877,000 tons; 1956, 47,068,000 tons; 1957, 48,549,000 tons; 1958, 34,299,000 tons.

The net sales: 1953, or 1954, \$149,181,620; 1955, \$168,572,075; 1956, \$335,586,582; 1957, \$375,633,935; 1958, \$282,233,537.

That is all we care to read.

Page 6, at the bottom.

(The reading of the deposition was continued.)

1038 "Q. Mr. Love, was Consolidation Coal Company the largest commercial coal producer in the period 1954 through 1958 in the United States? "A. I think it was. I think it produced more coal than any other single company.

"Q. Mr. Love, have you held positions in the years 1947 through 1950 as a representative of coal operators in dealing with the United Mine Workers? "A. Yes. In various negotiations I represented a district or several districts in negotiations with the United Mine Workers, and culminating in the 1949 negotiations when I represented a group of northern coal operators extending to West Virginia, Northern West Virginia, Pennsylvania, Ohio.

"Q. And was that called the Northern Conference at that time in the 1949-50 negotiations? "A. I think it was.

Deposition of George H. Love

1039 "Q. In that particular conference, during the latter part of it, were you the principal operators' spokesman in the conference?

"A. I was known as the spokesman for the operators in that conference.

"Q. In that period of time, Mr. Love, did the Union conduct more than one conference over the country, to your knowledge? "A. As I recall, there was a conference going on at the same time in some other part of the country; Bluefield, I think."

The Court: What year was this?

Mr. Rowntree: 1949-50 negotiations

(The reading of the deposition was continued.)

"Q. Was that with the Southern Coal Producers Association? "A. Yes.

"Q. And did the Union conduct from time to time negotiations with the Captive Mine Operators separately from the other conferences?

the other conferences? "A. I don't recall.

"Q. Well, let me ask this: The Northern Conference which you attended represented the largest production of coal of any of the conferences? "A. I think that's
1040 correct.

"Q. Before that 1949 through 1950 conference, had you represented operators in previous negotiations with the United Mine Workers? "A. I had.

"Q. Mr. Love, you had some pretty bad fights with the Union in these negotiations; is that right? "A. That is correct."

"Q. Will you state whether or not the United Mine Workers has exercised tremendous economic force in the coal industry in the period of your experience in dealing with them? "A. My answer is that they did exert a strong economic force."

Mr. Rowntree: To the next page, first question.

(The reading of the deposition was continued.)

Deposition of George H. Love

"Q. Mr. Love, will you state whether or not in your experience as a representative of operators, particularly as a representative of Consolidation Coal Company, the Union exercised such strong economic force in the industry that ultimately the Union was able to specify and control the policies of Consolidation Coal Company with respect to labor matters and with respect to its relationship and dealings with non-union coal companies, and small coal companies with which Consolidation dealt?

1041

"The Witness: That's a pretty tough question."

Mr. Rowntree: I think Mr. Corcoran's comment on page 10 should be read.

Mr. Kramer: Your Honor understands Mr. Corcoran does not represent the parties to this lawsuit. He was the attorney for the Pittsburgh Consolidation Company. He is making this statement. He was present when the deposition was taken, representing the deponent. He was counsel for them.

Mr. Rowntree: The middle of the second paragraph of that comment.

(The reading of the deposition continued.)

"Mr. Corcoran: * * * If I understand the question, you are asking Mr. Love if the Mine Workers dictate the policies of the Consolidation Coal Company. Of course they don't."

"The Witness: I will answer the question, if that is what the interrogator means. The United Mine Workers certainly doesn't."

By Mr. Rowntree:

1042 "Q. Well, has it in any of the periods of time that you have acted as a representative in dealing with the Union? "A. We negotiated with the Union; we have come to agreements, parts of which are unpleasant to us, ones that we resisted. But we finally came to an agreement, and the decision to come to an agreement rested with us.

Deposition of George H. Love

"Q. Were you connected with the predecessor company of the Consolidation Coal Company during the period of World War II? "A. I think I came with Consolidation Coal Company before the merger with Pittsburgh Coal in 1945. I came with the original company in 1943.

"You were familiar with the coal strikes during World War II? "A. Yes.

"Q. Were those strikes in which the United Mine Workers members struck? "A. Yes.

"Q. Do you recall how many of those strikes occurred in World War II? "A. No. I think the industry was taken over some five times in the 40's by Government.

"Q. Because of these strikes? "A. As far as I recall."

* * * * *

1043 By Mr. Rowntree:

"Q. Do you recall, Mr. Love, whether or not Mr. Van Horn was named as the operators' representative or trustee on the welfare fund?

"Q. Mr. Van Horn served as the operators' trustee of the welfare fund for a certain period before his resignation in the latter part of the '40's.

1044 "Q. And do you recall that he had some differences with Mr. John L. Lewis with respect to the operation of that fund? "A. I understand he did.

"Q. And do you recall that a strike ensued with respect to those differences in 1948? "A. I seem to recall a strike over it, yes.

"Q. I now refer, Mr. Love, to minutes of the United Mine Workers of America convention held in October, 1958, pages 80 and 81, to a letter of Mr. George M. Humphrey to Mr. John L. Lewis, in which Mr. Humphrey states, and I quote:

" 'I am advised that Mr. Van Horn, your co-trustee has been most diligent in his studies as to what uses may properly be made of the welfare and retirement fund and is prepared to discuss further with you his suggestions as to definite terms for a pension plan.'

"He further stated:

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"George Love, president of our company, met with you yesterday and expects to see you again before the end of the week in an effort on our part to explore possibilities of solving this problem within the limits of the law and the agreement."

"Mr. Love, is it your recollection that Mr. Van Horn had given close study to the questions at issue between him and Mr. Lewis?"

"A. I believe he did. I believe that's a fair state-
1045 ment."

"Q. Did you discuss those matters with Mr. Lewis as stated in this letter? "A. From the letter, I must have, but I don't recall the discussions at all."

* * * * *

"Q. You don't have any recollection? "A. No. I don't mean to repudiate any letter or anything else, but I just don't recall."

"Q. I refer to page 81 of those same minutes in which Mr. Lewis wrote a letter to the officers and members of all local unions, and in which he started off the letter stating:

"For eight months the Bituminous Coal Operators through their trustee, Ezra Van Horn of Cleveland, Ohio, have dishonored the 1947 wage agreement and defaulted under its provisions affecting the welfare fund."

"Mr. Love, do you recall whether or not the Bituminous Coal Operators in that period of time dishonored the 1947 wage agreement, and did they default under the terms of the welfare fund provisions?"

"A. I recollect that there is a period some time in those particular years when some operators—and I don't
1046 know which ones—did not make payments, welfare fund payments, to the Union or to the fund. How extensive it was, or whether our own company was one of them, I don't recall. But there was a period when some companies either put the money in escrow or didn't make immediate payment to the fund."

* * * * *

Deposition of George H. Love

• 1047 "Q. I refer to the minutes of the convention of the United Mine Workers of 1952; pages 65 et seq., a statement of Mr. John L. Lewis at the joint conference, June 23, 1949, where he stated:

" "There comes up at this conference, we think, this question of some regulation of the working time, some stabilization in the industry. The Mine Workers have gazed to some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly, we think the industry has been too hasty."

"And then further:

" "There has been much talk lately about a stabilization plan. Mention of it is affecting the Mine Workers and the Operators. It has no basis of fact, and cannot be considered practicable. It is true, however, that we do have a segment of the coal industry operating under the plan that brings about a distribution of working opportunity. (Mr. Lewis then explained the plan that had been worked out in the anthracite industry.)

" "We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry."

1048 "Do you recall, Mr. Love, whether or not this stabilization of the industry was a part of the negotiations?"

Mr. Rowntree: To the middle of page 25.

(The reading of the deposition continued.)

By Mr. Rowntree:

"Q. My question is, do you recall that this stabilization was a matter discussed at these conferences in 1949 and 1950? "A. During the 1949 and 1950 conferences, a discussion of shorter work weeks—because obviously there is a greater supply of coal or a greater ability to produce coal than the market—and the operators continued and unrelentingly resisted any interferences with their right to run their

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mines as many days as they saw fit. And they were successful when that contract was concluded to have the right to operate their mines as many days as they saw fit.

"Q. During this period of time of these negotiations, were the mines worked a full five days a week? "A. No. There were periods of three-day weeks, no day weeks, when strikes were going on, there were three-day weeks. That's what I recall about it.

"Q. Were these periods of work in the weeks set by the United Mine Workers or by the coal company? "A. Certainly not by the coal companies.

"Q. And the stabilization discussion revolved
1049 around limiting working time in the coal mines during these negotiations? "A. I don't recall stabilization as such, being discussed. I think there was a lot of discussion about limiting the work time.

"Q. But the reference— "A. We are hearing it now in steel; you hear it in all industries.

"Q. But the conference ended up with the signing of a contract which would not limit the production time of the coal companies? "A. That is correct, beyond the limitations we had before, like the number of hours per day, and so forth.

"Q. I believe, Mr. Love, that Mr. Van Horn resigned as trustee of the welfare fund during these conferences? "A. He resigned in that year. I can't recall the exact date.

"Q. I make reference to the minutes of the 1952 convention of the Union, page 71, a letter of Mr. Ezra Van Horn to the signatories of the 1947 and 1948 National Bituminous Coal Wage Agreements, dated September 14, 1949, tendering his resignation. Does that strike you as being the right period of time that he did resign, September, 1949? "A. That would be my recollection.

"Q. Who was chosen to succeed Mr. Van Horn as
1050 trustee? "A. I don't recall.

"Q. Does the name of Mr. Charles I. Dawson strike

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you as being the one who succeeded him? "A. I recall Judge Dawson being suggested to serve as a trustee.

"Q. Did he actually serve? "A. I can't tell you that.

"Q. Did he have discussions with you concerning conferences with Mr. Lewis? "A. I met Judge Dawson. I can't recall anything about any of the conversation.

"Q. Did you advise with him as to what he should do as trustee, or counsel him with respect to the position of the operators under the welfare fund? "A. I don't recall. I think that is the best answer to that. I mean, that's the right answer to that. I am sure, however, if I met with him, he met with other operators, and together we may have offered suggestions to him. Certainly I didn't take it on myself to advise him.

"Q. Do you recall if he had disputes with Mr. Lewis over the interpretation of the welfare fund provisions? "A. I recall some disagreements, but the details of which I have no recollection.

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1051 "Q. I refer to the minutes of the 1952 convention of the Union, pages 96 and 97, a statement from Mr. George Love, December 28, 1949, at Pittsburgh:

"The operators have also signified their willingness to put into effect a sound businesslike pension and welfare plan providing for pensions, accident and health insurance, hospitalization, group insurance equal to the program which settled the recent steel strike. The operators who will bear the entire cost ask only that the benefits be restricted to employees and immediate dependents, and that the fund be administered according to law and sound actuarial principles, so that our employees will actually have real protection."

"And, 'We understand that the Southern Coal Producers Association today filed charges before the National Labor Relations Board to prevent Lewis from continuing the three-day week in an effort to force operators to sign an
1052 illegal contract. We are in complete accord with this

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action, and our attorneys are preparing similar charges which will be filed at the earliest possible moment.'

"Does that refresh your recollection that some of the dispute related to the welfare fund provisions?" A. Yes, I recall the statement.

"Q. And do you recall that National Labor Relations Board cases were filed?" A. I don't recall that. I recall the statement and, therefore, I assume that they were 1053 filed."

"By Mr. Rowntree:

"Q. In that same statement, Mr. Love, I quote: "The blank check contract Mr. Lewis is trying to force on the industry would increase the already high wage rates of the miners and give Lewis and two stooges of his own selection theoretically representing the operators and the public, some one hundred and fifty million per year to distribute haphazardly to anybody he chooses."

"Does that recall to you that the naming of trustees on the welfare fund was also an issue in these negotiations?"

"A. It was an issue.

"Q. I refer to the minutes of the 1952 convention, pages 81-83, a statement of Mr. George H. Love, October 14, 1949, at White Sulphur Springs, West Virginia —"

"Q. Before coming to this statement to which I referred, Mr. Love, do you recall that you were trying to represent, and so stated, all of the bituminous coal operators in your various associations, whether they be large or small?" A. Well, I think you owe it to me to tell me what you mean by large and small operators.

"Q. Well, I will ask you what this language means here, and I quote from the statement referred to:

1054 "We represent many hundreds of commercial operators here, most of them relatively small, who have their backs to the wall because they have to sell their coal before it is mined. Many of them will not be able to open their mines if costs are increased by a new contract

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because they know how difficult it will be to have the public pay more even this year after all the strikes, memorial periods, stabilization days, and work weeks we have been forced to endure.'

"And, 'The picture for 1950 is beset with more competitive uncertainties than we have ever seen. Many operators feel the present stubborn demand by the Union for improvements this year may be a parallel situation to the one which existed under the Jacksonville Scale in the 20's, when a similar adamant attitude on the part of the Union leaders practically destroyed both the Union and the industry.'

"And, 'Asked about the industry absorbing the 30-35 cents a ton increase, he said "The industry is lucky to be breaking even. They can't share any increase in cost. Some individual companies can do it, but we represent hundreds of small commercial operators. These fellows haven't got any margin this year to absorb any increase in cost." And

he said that Wetter, Manley and Cartwright all are 1055 representing medium-sized mines. He said that he represented many small companies, that he was not speaking just for the Pittsburgh Consolidation Coal Company.'

"And, 'We have a tremendous responsibility here not to do something that Pittsburgh Consolidation can do, but something which these hundreds of other operators can afford.'"

"Referring to those statements contained in this statement of October 14, 1949, were these matters things which affected you in your negotiations with the union in that period of time?"

Mr. Kramer: Now, may we have just a moment, please?

Your Honor, as to this statement of Mr. Love, as taken from the minutes of the United Mine Workers Journal of this year, we continue the same running objection we have previously. I think Your Honor has allowed these. But we haven't waived these, we are still objecting, we want to

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again call attention to it, because it is the statement attributed to the conspiracy, and you cannot prove the conspiracy by one of the alleged co-conspirators until it has been established aside from the statements, the same objection we have made before, and we want to continue it.

The Court: That's correct.

Members of the jury, before these statements are competent as evidence and binding upon any alleged co-conspirator, the jury will have to find that there was a conspiracy and that such statements were made in the furtherance of the conspiracy.

Now with that explanation, the objection is overruled.

(The reading of the deposition was continued.)

"A. Well, let me first explain to you, because you seem to be talking about small operators as opposed to a little larger ones, that for all practical purposes there are no large companies in the coal business.

The single companies in the oil industry, for example, earn three or four times as much as the whole coal industry. This is a fragmentary business, relatively, some mine a little bit more, and some mine a little bit less.

Now, to go on, in being spokesman for the Northern Conference, you were spokesman for all the operators. You weren't spokesman for Western Pennsylvania as opposed to Ohio. You weren't spokesman for companies mining a million tons as opposed to those mining 50,000 tons. You were spokesman for the whole group of operators, 1057 and therefore, you had to have, if you were going to do your job, you had to have the welfare of the group in mind.

"I might add that what is good for a slightly larger company is generally good for the smaller ones. And if you have an industry where the relatively smaller companies are in difficulties, the larger companies will be in trouble, too.

"What are you looking for when you are a negotiator is to actually and honestly represent everybody that's part of

Deposition of George H. Love

your conference, and that includes operators in thin seams and thick seams, and various geographical districts.

"By Mr. Rowntree:

"Q. Will you state whether or not you had in mind that it would be more difficult for the small operators, as you refer to them here, to pay any increase in the scale, in the welfare fund, than it would be for the large operators, such as Pittsburgh Consolidation Coal Company? "A. I don't think you can differentiate by size. There were smaller operators who could pay a change in wages a great deal better than a larger company. There were larger companies in trouble, and there were smaller companies in trouble.

"To be perfectly honest, I think that the smaller company with tight management that has flexibility without the overhead of the large ones, could in many instances be in many instances be in better shape to pay a wage increase than so-called larger companies.

"There are all sorts of gradations when you have an industry as competitive and as fragmentary as we are. Poverty wasn't restricted to the smaller ones."

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"Q. Will you state whether or not that was a problem in your mind? "A. Regardless of the statement, I feel that my interest was the ability of any coal operator to pay any wage increase in the year 1950, any operator.

"Q. But the contract of 1950 was signed with the increases in it? "A. That's right.

"Q. Will you state whether or not you had in your mind a concern for the growth of non-union coal operations at that time? "A. I think that all of us, and particularly Consolidation Coal or any other operator, has concern for the possibility of his neighbor or someone paying a smaller wage scale, a lower wage scale. I don't think it's controlling in this particular negotiations.

"Q. There was a growth in the production of non-union mines in this period? "A. I don't recall."

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Deposition of George H. Love

"Q. I will quote from this statement which I have just quoted from before:

'He was asked about the volume of non-union coal. He said it was about twenty-five per cent of production in the northern districts, and added that there was a big volume of non-union coal in the midwest. He said the progressive miners and non-union mines in Western Kentucky mined about two million tons of coal a year.'

"Does that recall to you that you were concerned about that production at that time? "A. I should think running a coal company we would always be concerned about some competitors that could pay a lower wage scale than you could. I think that is a perfectly proper concern."

"Q. Mr. Love, the contract was signed naming Mr. Charles Owens as trustee for the operators? "A. Correct.

"Q. Did you discuss his nomination and selection
1060 as trustee with Judge Dawson before it was done?

"A. I don't recollect."

"Q. Will you state whether or not Josephine Roche was named as neutral trustee in the 1950 contract? "A. She was named as one of the three trustees.

"Q. Were you familiar with the relationship of Miss Roche to the United Mine Workers of America in previous years? "A. No.

"Q. Do you recall how the operators came to sign that 1950 contract? Was there an incident that prompted them to sign more than anything else? And I will ask you whether or not you recall a decision of the District Court in Washington concerning a contempt charge brought against the union?

"A. I don't recall. As I do remember is that there was finally willingness on the union to negotiate the economic part of a contract, and it was our best judgment to conclude the contract and stop losing coal business to other fuels.

"Q. And the thing that the union gave up, will you state

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whether or not that was the policy of dictating the working time in the industry?

1061 "Q. They gave us the right to run our own mines, and that was a very important economic consideration, along with other things which I can't recall.

"Q. I refer to a statement in the 1952 convention minutes of the Union, pages 125 and 126 of Mr. George H. Love, following the signing of the National Bituminous Coal Wage Agreement in 1950, March 5, 1950, among other things quoting: —"

Mr. Kramer: Objection.

(The reading of the deposition was continued.)

" "The union asked for a co-operative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry. However, the responsibility —"

* * * * *

Mr. Kramer: Your Honor, we want to object again.

1062 Your Honor, this is a statement of an alleged representative—of a representative of one of the alleged conspirators, and it is found in the United Mine Workers Journal, and they are quoting from that. That is what they have, and we object to that, Your Honor, again for the reason you cannot prove a conspiracy in this manner.

The Court: You cannot prove a conspiracy by a statement of an alleged conspirator, but if the conspiracy is found by the jury to have existed, and if a statement was made by an alleged conspirator in furtherance of a conspiracy, then the statement made by the alleged conspirator is binding upon all the conspirators.

Mr. Kramer: And it is our position, further, Your Honor, that the conspiracy has not been established prima facie, and until it's established, even this type of evidence is not admissible. It might be afterwards.

The Court: But it is the holding of the Court that if the

Deposition of George H. Love

matter goes to the jury, that that is a question of fact for the jury, after the jury hears all of the evidence.

1063 “The union asked for a co-operative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry. However, the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union.”

“Do you recall that statement, Mr. Love?”

Mr. Combs: May it please the Court, may I point out, Your Honor, that this was made in a press statement by Mr. Love, probably in Washington, after the signing of the contract, and since counsel has read only part of one paragraph, may I read the entire paragraph? It is short.

The Court: Yes, sir.

Mr. Combs: This is a statement of Love made at a press conference after the signing of the 1950 contract.

“We have had a good fight, but we are all glad it is over. This two and a half year contract gives the industry its first real opportunity for stability in the last decade.

1064 “Both the union and the operators made concessions. The operators definitely established the right to control their production in their mining facilities.

“The union asked for a cooperative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry, however the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union.”

And then he goes ahead to say that:

“This country is one of the very few where coal mining is still in private hands operating under a free enterprise

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system. It carried the country's enormous needs during the war and since without Government help or subsidy. It is a modern aggressive industry with three to six times the productivity of the coal industry in any other country, and we are going to do better than that."

That was a public press conference of Mr. Love.

1065 Mr. Kramer: Your Honor, Mr. Love did not attend this convention as this record shows, and it is what someone said he said at a press conference. It is quoted in these minutes, which, of course, is hearsay of the second degree, and we do not think it is competent at all.

Mr. Love was not at the International convention and did not make the statement there.

"Q. Do you recall that statement, Mr. Love? "A. Not in detail, but in principal."

"The Witness: I never attended a convention of the United Mine Workers in my life."

Q. Mr. Love, do you recall an effort after the signing of the 1950 contract to have the National Labor Relations Board cases brought by the operators dismissed? "A. I do not recall.

"Q. Consolidated Coal Company, has it had any serious strikes since the 1950 contract? "A. Yes, it has had some very serious local strikes in the last 10 years.

"Q. I would like to ask you, Mr. Love, if you could file as Exhibit 2 to this deposition the prospectus of Consolidation Coal Company, October 24, 1956, concerning the issuance of 2,678,897 shares of common stock for the Pocahontas Fuel Company Exchange."

1067 "Q. I am quoting from that prospectus:

"There has been no general strike in the bituminous coal industry since March, 1950. The company has experienced no material work stoppages or unusual labor

Deposition of George H. Love

difficulties since that date, with the exception of unauthorized work stoppages at its mines in northern West Virginia during portions of the months of April, May, and June, 1956, which decreased the company's production by approximately 850,000 tons during that period.

"Effective October 1st, 1956, a new wage agreement was signed with the United Mine Workers of America. This agreement provides for an immediate wage increase of \$1.20 per day and an additional increase, effective April 1st, 1957, of 80 cents per day, as well as for certain fringe benefits. The new agreement is expressly not subject to termination prior to September 30, 1957; but after that date may be terminated by either party on 60 days' notice to the other. To cover the increased labor costs arising from the October 1st wage increase and the accrued increases in material and supply costs, the company has made increases of approximately 40 cents per ton in its prices. Other companies have also increased their coal prices. While the increases have been in effect too short a period to permit a definite estimate as to their ultimate effect on the position of the coal industry, the company does not believe that under presently existing conditions they will materially affect its ability to market its product."

"Mr. Love, is that statement true and correct? "A. If we put it in the prospectus, it must be true and correct. Whether that's an actual quotation of it, I don't know. But whatever is in the prospectus, I will take it as being so."

Mr. Rowntree: And that statement was filed with the prospectus, your Honor.

Bottom of the page.

(The reading of the deposition was continued.)

"Q. The substance of the statement is true; is that correct? "A. I will say what I did, if this is a proper reading of the statement in the prospectus, I know it's correct. Now, whether it is or not, I am not prepared to say. But I repeat that we did have work stoppages during the period, and

Deposition of Robert L. Kaiser

continued to have them after that date, of a serious,
1069 local nature.

"Q. And those were unauthorized work stoppages, as you call them? "A. We used that word. And by unauthorized, I don't quite know what that means, whether unauthorized by the local or by the district, or by the national. Perhaps the word is a little unfortunate.

"But we had serious local work stoppages."

Mr. Rowntree: I would like to take up the deposition of Mr. Robert L. Kaiser taken at Cleveland, Ohio, November 11, 1960, on page 4.

"ROBERT L. KAISER

a witness called by the defendants and cross plaintiffs,"

DIRECT EXAMINATION

"By Mr. Rowntree:

1070 "Q. What is your name, sir? "A. Robert Kaiser.

"Q. Are you an officer in Otis & Company? "A. Yes, sir.

"Q. Is the principal office of that company in Cleveland?

"A. Yes, sir.

1072 "Q. How many shares of stock does Mr. Daley own in that company?"

Mr. Rowntree: I will just interpolate. The name of Mr. Daley is William R. Daley.

(The reading of the deposition continued.)

"A. All of them.

"Q. Is Mr. William R. Daley associated with Mr. Cyrus S. Eaton in any business connection in this company or any other company? "A. Yes. Over a period of many years, I believe, Mr. Eaton and Mr. Daley have had common interests in a number of business situations."

Deposition of Robert L. Kaiser

"Q. What is your official position in Otis & Company?

"A. I believe I am a secretary, and I may have some other office, but I want to check that.

"Q. Are you associated with Mr. Cyrus S. Eaton in any corporation in which he is also an officer of a stockholder together with you? "A. Yes.

"Q. And what other corporations are those? "A. Mr. Eaton, I believe, and I are both officers of Portsmouth Corporation.

1073 "Q. Does Otis & Company declare dividends? "A. No, sir, not recently "

"Q. Does Mr. Cyrus S. Eaton hold an office in Otis & Company? "A. I believe not.

"Q. Does Mr. Cyrus S. Eaton, Jr. hold an office? "A. I believe not. I am not sure of that. I would have to check that.

"Q. Does Otis & Company own stock, common or preferred, in West Kentucky Coal Company? "A. I believe not.

"Q. Has it ever? "A. Undoubtedly it has.

"Q. And when it did own that stock, was it owned in its own name outright, or was it owned beneficially for some other party? "A. Well, if Otis owned it, it owned it beneficially.

"Q. For someone else? "A. No. If Otis owned it, it owned it beneficially."

1074 "Q. Are you a director of the West Kentucky Coal Company, Mr. Kaiser? "A. Yes, sir.

"Q. And you are secretary of Portsmouth Corporation? "A. Yes, sir.

"Q. Now, Mr. Kaiser, do you know how many shares of stock are outstanding in Sagamore Summit Corporation? "A. Yes, sir.

"Q. How many shares are outstanding? "A. 195 shares.

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"Q. Can you state the names of the owners of those shares? "A. They are all owned by Mr. Cyrus S. Eaton, Jr.

"Q. How many shares are outstanding of Tower Industries, Inc.? "A. There are 210 shares outstanding.

"Q. Who owns those shares? "A. They are owned by 15 individuals, primarily spouses of Mr. Eaton's children, spouses and/or business associates.

"Q. Mr. Kaiser, are you familiar with the trans-
1075 action whereby Chertsey Corporation acquired shares of stock of Chesapeake & Ohio Railway Company? "A. I know that they did acquire such shares.

"Q. Are you connected with Chertsey Corporation? "A. Yes, sir.

"Q. What is your connection? "A. I am secretary and treasurer of Chertsey.

"Q. How many shares of stock are outstanding in Chertsey Corporation? "A. 200 shares.

"Q. And who owns those shares? "A. They are owned by Mr. Eaton and various of his children.

* * * * *

1078 Mr. Rowntree: If your Honor please, the next deposition is that of Mr. Cyrus Eaton, and in order to obtain a proper understanding of this deposition I would like to state a contention with respect to promissory notes executed by Mr. Eaton and certain corporations.

It is our contention that these notes manifest an unusual relationship; that it is not the usual loan transaction. I understand that the other side contends that it is the usual loan transaction.

Our contention is founded upon a provision in each of these notes, and I have not yet read the notes into evidence and I think I should just read a paragraph at the end of one of these notes which is common to all of them.

1079 This particular note is Exhibit 49, executed by Mr. Eaton.

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"At any time prior to or at the maturity of this note, I shall have the right to tender to the payee"—

The payee being the United Mine Workers of America.

Mr. Kramer: No, just a moment.

Mr. Rowntree: To the officers of the United Mine Workers.

Mr. Kramer: I think all of these notes—I think it is true of all of these, Thomas Kennedy, W. A. Boyle, John Owens, Trustees, International Union.

Mr. Rowntree: Payees are the International officers, Trustees of the International Union.

"At any time prior to or at the maturity of this note, I shall have the right to tender to the payee the security pledged as collateral for this note in full satisfaction of any amounts due on account of principal or interest. If such tender is made, I shall have no further interest in the collateral or in the excess of the value of the collateral over the amount due under this note, and I shall have no
1080 liability for any deficiency in the value of the collateral below the amount due under this note."

Our viewpoint is based on this circumstance, which is understandable by this illustration.

That if I borrowed money from Mr. Robertson, putting up the collateral stock which I bought with that loan, executing a note with this provision in it, in the event the stock increases in value tremendously, subsequently I can go to Mr. Robertson and say, "Here is the money I borrowed from you. Let me have the stock back."

Now if the stock goes down in value, if it goes down tremendously in value, I can then later on go to Mr. Robertson and say, "With respect to this loan I made from you sometime back, I don't want any more to do with it. I will let you have the collateral. I tender to you the collateral and let me have my note back because the note says I am not liable for any deficiency."

And one step further on, as counsel has pointed out, these notes are executed to trustees in a fiduciary capacity, and

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the loan which they made with this type of clause in it, it is our contention, was not made in ignorance of their trustee responsibility, their fiduciary responsibilities as trustees of that money.

In that regard, we would like to point out one answer in Mr. Lewis' deposition which was not clear because we had not put the notes in at that time.

1084 Mr. Rowntree: "Q. The International officers of the Union, as Trustees of Union funds, would have an obligation to check upon and to pass upon and to take steps when need be, to preserve the assets in which they had invested Union funds; is that not true? "A. Sir, I have a full appreciation of the obligations of the Trustees acting in a fiduciary capacity.

"It has been my lot to be a Trustee in a number of instances. I have an understanding of the obligations placed upon fiduciary Trustees under the law and the statutes made and provided. And all those things are taken into consideration when the Trustees exercise their judgment.

"The Trustees of the United Mine Workers are satisfied with the investment in the West Kentucky Coal Company and are quite content in the belief that, in the end, it will prove to be immensely profitable to the United Mine Workers of America in a financial sense; a wise investment of the funds."

Mr. Kramer: Your Honor, I want to make one statement. and then Mr. Combs wants to make a statement. I want to point out particularly to your Honor and the jury
1085 that we are talking now about trustees other than the trustees of the Welfare and Retirement Fund. The trustees of the Welfare and Retirement Fund are entirely a separate entity from the trustees that are being talked about here.

These are trustees for certain funds that belong to the United Mine Workers of America and properties of the United Mine Workers and are in no wise connected with the

Statements of Counsel

funds that belong to the Welfare and Retirement Fund.

So we must not get confused that it is the same trustees, because they are separate and distinct entities and separate parties in this lawsuit.

The Court: That is correct.

Mr. Kramer: Now Mr. Combs wants to make an explanation.

Mr. Combs: May it please the Court, ladies and gentlemen of the jury, the notes that counsel is speaking of are promissory notes. They are payable on demand. Mr. Lewis has testified that Mr. Eaton, in regard to these notes, that the particular provision in these notes has no particular significance, except in a commercial transaction. I know that the jury and the Court will bear in mind that in addition to the collateral to these notes was the promise to pay by the individual involved.

1086 This is a series of notes that counsel has introduced and will be commenting upon.

It is the contention of the United Mine Workers that none of these transactions were in any way, shape, form or fashion in connection with any conspiracy. The contention is that these were investments; they were legal investments in every way; that the trustees of the United Mine Workers had the right to make the investments; they made them with full knowledge of their fiduciary relationship, as counsel talks about. They made those with that in mind.

The stocks involved are stocks, as I recall, in the Chesapeake & Ohio Railway, stocks in certain utility companies, and West Kentucky Coal Company. So it is the contention of the Mine Workers, and I think the evidence will show, that these were commercial transactions taken with full legal rights to all parties concerned.

In connection with the ability of the maker of the note to tender the collateral and get his note back, the statement of counsel, it may be pointed out that the testimony of Mr. Lewis, and I think the testimony of Mr. Colton, which has not been read but it will be read here in connection with that

Deposition of Cyrus S. Eaton

—in reply to counsel's contention asked of the witness did that not mean that the maker of the note had a right
 1087 to share in any profits that m. y be made in the trans-
 actions; but at the same time to relieve himself of loss
 in case the stock went down, the reply of both Mr. Eaton
 and Mr. Lewis was simply this, that if they sold the stock at
 a loss, of course they would lose money.

There is nothing in the record or the contention that would
 show that there would be any necessity or desire to sell stock
 at a loss.

Mr. Rowntree: Deposition of Mr. Cyrus S. Eaton, taken
 at Cleveland, Ohio, November 11, 1960.

(The reading of the deposition was as follows.)

"CYRUS S. EATON

a witness called by the defendants and cross plaintiffs, pur-
 suant to the federal rules of civil procedure, was by me
 first duly sworn, as hereinafter certified, and deposed and
 said as follows:

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. Cyrus S. Eaton.

"Q. Where do you live, Mr. Eaton? "A. North-
 1088 field, Ohio.

"Q. Is that near Cleveland? "A. That's outside of
 Cleveland, Ohio.

"Q. Have you always resided in Cleveland or therea-
 bouts? "A. No; for only 60 years.

"Q. You are Chairman of the Board of Chesapeake &
 Ohio Railway Company? "A. Yes.

"Q. And you have other business interests besides the
 railroad? "A. Yes.

"Q. I believe that you are Chairman of the Board of
 Steep Rock Iron Mines? "A. Yes.

Deposition of Cyrus S. Eaton

"Q. And Portsmouth Corporation? "A. Yes.

"Q. West Kentucky Coal Company? "A. Yes.

"Q. White Sulphur Springs Company? "A. Yes.

"Q. And the Nashville Coal Company? "A. Yes.

"Q. Are you also on the Board of Directors of Sherwin Williams Company? "A. Yes.

1089 "Q. Cleveland Cliffs Iron Company? "A. Yes.

"Q. Kansas City Power and Light Company? "A. Yes.

"Q. And the Cleveland Electric Illuminating Company? "A. Yes.

"Q. Mr. Eaton, United Mine Workers has filed an exhibit in this case, and I refer to Exhibit 1-A"—which is now Exhibit 49—"The first page of the interrogatories propounded to defendants and cross plaintiffs, Set No. 2, a letter or a promissory note signed by Cyrus S. Eaton, February 7, 1958, in the principal amount of \$1,793,750, which I show you and ask you, did you sign such a note? "A. Yes.

"Q. Now, the Union has answered that this principal amount shown on that note was part of a loan—was a loan which commenced February 7, 1951. This note is dated February 7, 1958. Can you explain the difference in that date from the commencement of the loan? "A. The notes were renewed annually. So this would be a renewal of the original.

1090 "Q. The first note was payable on or before one year after date, I take it? "A. That's my recollection.

"Q. And as the year approached the termination, there would be a renewal of the note? "A. Yes.

"Q. And this occurred each year until this note was executed? "A. That's my memory.

"Q. A notation at the bottom of that note states that the original was returned to Mr. Eaton — "A. Yes.

"Q. — 6-5-59. Was the original of that note returned to you? "A. Yes.

"Q. Was that because there was another renewal? "A. Yes.

Deposition of Cyrus S. Eaton

"Q. In other words, there is a replacement note that took the place of this exhibit here?"

Mr. Rowntree: Now we will skip, because a note was later furnished the replacement note, and I would like to put into evidence the two promissory notes furnished as a late filing to this deposition.

The first note is executed by Mr. Cyrus S. Eaton to the international officers of United Mine Workers individual named as trustees of the international union, January 26, 1960, in the amount of \$1,815,284.87.

Mr. Kramer: I want to object. He has finished one, and I will comment on the other.

Between the two, I object to these for the reasons given the other day. These do not deal with West Kentucky stock at all. These are dealing with reference to C & O stock under this record here. We say they have no connection, are irrelevant and immaterial, and they are not admissible.

The Court: For what purpose are they introduced?

Mr. Rowntree: We are probing this relationship, your Honor.

The Court: All right. The objection is overruled. They may be introduced solely for the purpose indicated.

Mr. Rowntree: We introduce that note as Exhibit 67.

(Exhibit No. 67 was marked for identification and filed.)

Mr. Rowntree: And we introduce as the next exhibit a note similarly executed to payees by Mr. Cyrus S. Eaton, February 7, 1960, in the amount of \$1,793,750.

1092 (Exhibit No. 68 was marked for identification and filed.)

By Mr. Rowntree:

"Q. Now, my question is as to the background of this transaction shown on that Exhibit 1-A"—presently Exhibit No. 49—"before you, Mr. Eaton. "A. That would go back to the events which occurred perhaps as long ago as 1951 where I made a loan from the United Mine Workers and

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secured that loan by stock of the Chesapeake & Ohio Railway.

"Q. Mr. Eaton, did you ask the Union for this money for the purpose of buying this stock?"

Mr. Kramer: Without continuing the objection, the record may show we continue the objection where
1093 the C & O stock is involved?

The Court: Yes, sir.

(The reading of the deposition continued.)

"A. Whether I had agreed to buy the stock before I spoke to the Union, I don't recall. But I did discuss with the Union their willingness from their unemployed funds to make a loan on C & O stock.

"Q. And it was understood that you would buy this stock with the proceeds of the loan? "A. I probably would already have purchased the stock and asked the Union whether they would care to loan money on that collateral.

"Q. May I ask from whom you purchased the stock in this particular transaction? "A. The stock was purchased from Robert R. Young and Associates. I do not recall just which one of the groups associated with Mr. Young sold the stock.

1094 "Q. Was any of it purchased from Allegheny Corporation? "A. My recollection is that the Allegheny Corporation was an owner of the stock or a part of it.

"Q. When was this stock purchased that was put up as collateral for Exhibit 1-A there? "A. Well, as I say, I can't be sure of just what stock was used at that particular time, but the stock I am referring to was stock purchased in 1951.

"Q. Did you own C&O stock at the time or immediately prior to that purchase? "A. Oh, yes.

"Q. And is it true that you bought one block of 250,000 shares at this time? "A. No.

"Q. Did you buy at any time one block of 250,000 shares of stock? "A. No.

"Q. In 1951, in connection with the funds furnished by the

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Union, did you buy an aggregate amount of 250,000 shares?

"A. No.

"Q. Did you purchase stock on behalf of, or acting as agent for United Mine Workers of America, in C&O 1095 Railway stock? "A. No.

"Q. Do you know whether or not the United Mine Workers of America bought stock at that time in C&O? "A. I don't know.

"Q. Are you acquainted with the fact that United Mine Workers of America owns 124,927 shares of C&O Railway Company? "A. No, I am not familiar with their total ownership.

"Q. And you are not acquainted with the fact that the Union carries that stock on its books at a sum of \$4,390,-009.88? "A. No.

"Do you know the total number of shares of stock which are reflected in these exhibits to interrogatories, Set No. 2 and 3, aggregate 50,000 shares of C&O stock put up as collateral by you under Exhibit 1-A, first page; 52,427 shares under the second page of Exhibit 1-A; and 22,500 shares of C&O stock put up by Chertsey Corporation —

— under page 1-C, Set No. 3 of the interrogatories on page 2, and that those numbers of shares aggregate 124,927 shares, the same amount of shares as the Union states it owns?

1096

In other words, Mr. Eaton, these exhibits that I have referred to supplied by the Union show in the loans commencing February 7th, 1951, the number of shares put up as collateral by you and by Chertsey Corporation aggregate 124,927 shares in C&O, which is the same number of shares which the Union carries in its own name on its books."

Mr. Rowntree: An objection by counsel for the witness, Mr. Fortas.

Mr. Kramer: That was not by us, Your Honor. The witness had his own personal counsel, and the instructions

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used between that counsel and the witness, we do not think are competent for any purpose in this lawsuit, and the question was not answered, and I think it goes down to the next question.

(The reading of the deposition was continued.)

"Q. In the face of that observation, does that recall to you that the Union purchased stock in the same amount as you and Chertsey bought at approximately the same time and at approximately the same price?"

1097 "A. The answer is no.

"Q. Mr. Eaton, do you recall, were your purchases at the time of this Exhibit 1-A, the original note in 1951, made at the quoted figure for purchases on the Exchange?"

"A. May I have that question again, please?"

"(Question read.)"

"A. Some were purchases on the Exchange, which would obviously be at the market, and any other purchases made by me would have been at the market."

"Q. Mr. Eaton, Exhibit 1-A states in the last paragraph, and I quote, 'At any time prior to or at the maturity of this note, I shall have the right to tender to the payee the security pledged as collateral for the note in full satisfaction of any amounts due on account of principal or interest. If such tender is made, I shall have no further interest in the collateral or in the excess of the value of the collateral over the amount due under this note, and I shall have no liability for any deficiency in the value of the collateral below the amount due under this note.'"

1098 "Do you recall if the original note had that provision in it? "A. I believe so."

"Q. Did Mr. John L. Lewis show any reluctance in making this loan on these terms? "A. His associates considered

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it carefully, and decided that it was a prudent loan for them to make."

"Q. Was it not the understanding between you and the officers of the United Mine Workers of America that 1099 this stock would belong to the United Mine Workers of America, and that it would stand the risk of loss by reason of decline in value, and that you would stand and acquire the gain that would be realized by increase in value? Wasn't that the understanding? "A. No.

"Q. Was it the understanding that you would have the gain and the Union would suffer the loss? "A. No.

"Q. So that was not the understanding; is that right?

"A. The answer is no to the question.

"Q. I mean, it was not the understanding then that you would have the gain and the Union would suffer the loss?

"A. No.

"Q. Now, turning to the second page of Exhibit 1-A of the Set No. 2 interrogatories, the Union has stated that this loan was commenced February 7, 1951. I observe that the date on this note is January 26, 1958. Do you know the reason for that, Mr. Eaton? Was this loan actually started a little before February 7, 1951? "A. I am not sure that this is a continuation of loans made in 1951. There were loans made at other times, some of which have been paid off.

1100 "Q. Now, I note that on the bottom of this exhibit, the original has been returned to you as of 6-5-59. And the answer with respect to any supplemental notes would be the same as applies on the first note, I take it? "A. Yes, that's right."

Mr. Rowntree: I believe that note was introduced a moment ago as the last exhibit.

Mr. Rowntree: This is Exhibit 61.

"Q. Now, turning to Set 3, Exhibit 1-C, page 2, the principal amount of this note is \$517,484.54. Now, was this part

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of the same transaction that was involved in the last two notes that we were looking at?

"Mr. Fortas: Counsel, excuse me. This is a note signed by Chertsey Corporation, isn't it?"

"Mr. Rowntree: Yes."

"Mr. Fortas: To which you are presently referring?
1101 ring?"

"Mr. Rowntree: That's right."

"A. I don't know that you could characterize it as part of the same transaction. It was a loan from United Mine Workers to Chertsey secured by C&O stock."

"Q. And the Union states that this loan likewise commenced February 7, 1951; is that your recollection?" "A. I am not sure of that."

1102 "Q. But anyway, the matter was discussed approximately the same time as the other two notes, by you, with the union officers?" "A. Yes. Any loans made by the Union on the Chesapeake & Ohio stock were discussed with me."

"Q. And the proceeds were used to pay for stock either acquired or to be acquired by you or by Chertsey Corporation?" "A. Stock already owned or to be acquired by me—either by the company or by me."

"Q. And the collateral on this note was 15,000 shares of C & O Railway. And turning to page 3 of this Exhibit 1-C"—presently Exhibit 51—"of Set 3, the amount of that note of Chertsey Corporation was \$263,464.39. The Collateral there is 7,500 shares of C & O Railway stock."

"Now, isn't it true, Mr. Eaton, that the first page of this Exhibit 1-C supplanted and took the place of pages 2 and 3?"

"A. All three are Chertsey Corporation, are they?"

"Q. That's correct. "A. It's a matter of calculation to see whether they are the same amounts. That is a book-keeper's job, maybe, rather than mine."

"Q. Well, you can see that the amounts and up to the same amount as on the face of the first page?"

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1103 "The Witness: They don't seem to be the—"

Mr. Kramer: His answer is, "I think someone with an adding machine better make that."

Pass all that of intervening counsel.

"Mr. Kramer: Dollar-wise, I do admit."

Mr. Kramer: Take an adding machine and added them up. That would be a safe admission.

The Court: That is a pretty safe admission.

Mr. Rowntree: We submit they do add up to the same. In other words, the two older notes add up to the same as the later note on the principal amount.

1104 "Q. I am talking about the principal amount of the notes."

Mr. Kramer: We admit that they add up that way. Still back to the adding machine, and I believe the adding machine is right.

"Q. That is with respect to the principal amount. Now, the collateral is different. Page 1 has 14,783 shares as opposed to a total of 22,500 shares in the other two pages, the previous notes. Can you explain that difference? "A. Is the collateral more or less?

"Q. The collateral is less on the supplemental note. "A. I think the market of the collateral is several times the size of the obligation, and as is customary in many cases of this kind, the collateral was reduced.

"Q. Because of the increase in value of the stock since the time of the original loan transactions? "A. Yes.

1105 "Q. Did Chertsey Corporation acquire the amount of collateral that was taken down? "A. Yes."

"Q. If the C & O stock went down in value after the loan, which is reflected in Exhibit 1-C, at any time you or Chertsey Corporation—Chertsey Corporation could have offered

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the stock at its decreased value to the Union, and could have received a release of its liability?

"Q. Was that the understanding that you had with the Union? "A. I don't believe that I can attempt to interpret just what you have in mind or the point of your inquiry, nor do I think I could be expected to undertake to deal with some imaginary thing in the past, where all sorts of conditions and circumstances might have surrounded it. I think if I attempted to reconstruct something of that kind, I would have to get into all the history of what was going on in a busy world, and that's too big a job.

"Q. Mr. Eaton, I am referring to the line at the bottom of the note, Exhibit 1-C," — presently Exhibit 51 — "page 2 of Set 3, which states that the maker of the note at any time had the right to tender the security, the C & O 1106 Railway shares, which was the collateral to the payee, and if such tender were made, the maker would have no liability for any deficiency in the value of the collateral below the amount due under the note.

"Now was that the real understanding? Was there any other understanding between you and the Union? "A. This sets it out.

"Q. This is the understanding? "A. Yes."

"Q. There was no other understanding; is that right? "A. That's right.

"Q. So at the time of this taking down of some 8,700 shares of C & O stock from the collateral on this note, the shares of stock left being 14,783 shares supported the note of \$780,000? "A. Well, the note and the collateral will speak for themselves. I will not undertake to make that calculation.

"Q. But I think you have already testified that the value of the stock went up and that the balance of the shares retained as collateral supported the note? "A. That's right.

"Mr. Fortas: Plus—if we are going into the legal

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1107 construction of this document—plus the promise to pay as set forth in the note.

“Mr. Rowntree: Yes.

“Q. So that the shares, the value of the shares that were taken down by Chertsey Corporation was roughly \$400,000?”

“A. I wouldn't undertake to calculate that.”

Mr. Rowntree: If your Honor please, for explanation I would like to show how we arrive at the \$400,000.

14,783 shares were left as collateral supported the loan of \$780,000. Each share would have a value of at least \$53.00. That is simple division.

Mr. Kramer: We object to that.

The Court: Well, that isn't testimony. He is making an explanation of his position, which he has a right to do, but it is not testimony.

Mr. Kramer: We understand. But, your Honor, that is not factual. Counsel is inaccurate.

The Court: You can make your explanation, Mr. Kramer, in reply to his.

Mr. Kramer: I don't think counsel intends to be inaccurate. I was hoping he would correct it.

1108 The Court: Neither side intends to be inaccurate. I know counsel well enough to know that.

Mr. Kramer: What he is saying is that its total valuation is \$780,000. That was the amount of the loan. And there were 14,780 shares of stock put up as collateral for it.

That does not mean that dividing 14,783 and \$780,000 you get the value of one share of stock. Counsel said that but did not mean to. If you want to figure it on a pro rata basis, that was it, O. K. But that isn't the value of the stock, the collateral.

I am saying that you can't divide 14,783 into \$780,000 and say the ultimate dividend that you get, the result of that division is the value of a share of stock because that is not the value of the shares of stock, and I say that could not be

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accurate on that basis. We have no objection stating the facts as they exist.

Mr. Rowntree: I don't understand counsel. If I bought stock like that that is the way I would figure out what each share was worth. That is my contention, anyway.

The Court: All right.

Mr. Rowntree: I don't understand counsel.

The Court: Mr. Kramer, you deny that his contention is sound?

Mr. Kramer: Yes, we do, your Honor. When you buy a house and lot and use it for collateral for a certain loan, I don't see how splitting off so many feet of that lot and for each foot of that lot say is the equivalent divided by the front footage into the amount of that loan, you wouldn't divide property that way, and I am saying that is not an accurate description of the security. If I have a vacant lot and make a loan, I can't say that every foot of that lot divided into the amount of the loan is the value of it.

Mr. Rowntree: We differ with comparing real estate with shares of stock, and we think there is a definite intrinsic value of each share.

Mr. Combs: May I make an observation.

I think the jury should remember that they are talking about a loan that was made on February 7, 1941—1951.

Now the value of the stock, C & O stock, was reflected on the stock exchange. Mr. Eaton has testified to that. There is nothing in this record that I know of that shows what C & O stock was selling for in 1951 or at the time the collateral was made.

There is testimony that the remaining collateral was far in excess of the amount loaned. And I think that is the point. Thank you.

Mr. Rowntree: It is our contention that the testimony has clearly shown that the stock went up in value and they took down collateral leaving enough stock in there to support the loan.

Mr. Combs: To that I agree. That is right. That is a

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correct statement. But this evaluation of \$400,000 has no purpose in here, that I can see.

Mr. Rowntree: To complete our computation, if we multiply the 8,700 shares taken down by the \$53.00, which we derived by that previous division—

Mr. Kramer: But you do admit there is nothing in here that shows the listed price of the stock at \$53.00 a share?

Mr. Rowntree: The only testimony is, Mr. Eaton testified in this deposition previously read that the shares of stock remained supported the loan.

Mr. Kramer: That is true. And there is nothing to show the value of the stock on the market in this record.

Mr. Rowntree: Second question from the bottom of that page.

(The reading of the deposition was continued.)

1111 "Q. Does Chertsey Corporation still own those shares of stock that were taken down from the collateral? "A. I can't answer that without looking it up.

"Q. Do you recall if you yourself, individually, acquired any of those shares? "A. No.

"Q. Do you recall if any officer of the United Mine Workers of America acquired any of those shares? "A. I am sure that none of them did. If they wanted to buy shares, they could have bought them on the open market. There are plenty of them.

"Q. Has any auditor of the United Mine Workers of America inspected the records of Chertsey Corporation? "A. I don't believe there has been any occasion for that. I don't recall any such occurrence.

"Q. Is it not true that funds derived from the United Mine Workers of America paid for these shares? "A. That is not necessarily the case.

"Q. In the light, Mr. Eaton, of the language of the last paragraph of these notes that we have referred to, is it not true that in the acquisition of these shares of stock you were acting merely as an agent for United Mine Workers of America? "A. No."

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1112 "Q. Is it not true, Mr. Eaton, that these shares of stock that were taken down from the collateral on this occasion that we referred to here in Exhibit 1-C, that this was merely compensation to you or to a company affiliated with you for the handling of the transaction of the acquisition of shares of stock by United Mine Workers of America? "A. No.

"Q. Returning to Exhibit 1-A of Set 3, here we have a note secured by collateral of West Kentucky Coal Company, in the name of Chertsey Corporation in the principal amount of \$2,153,279.50, dated January 30th, 1958.

"Now, the Union has answered interrogatories stating that this loan likewise commenced February 7, 1951.

Do you recall if this transaction represented on this note was involved in the same transactions that we have been talking about before involving C & O Railway stock? "A. They have no relationship of any kind.

1113 "Q. This was an entirely separate transaction? "A. Completely."

"Q. This note also, Mr. Eaton, states that the original was returned to Mr. Eaton 6-5-59. I would like to examine the papers brought in under the subpoena to see the present supplemental note."

Mr. Kramer: Papers were handed to counsel.

(The reading of the deposition continued.)

By Mr. Rowntree:

"Q. Mr. Eaton, counsel has furnished us a copy of a promissory note dated January 30th, 1960, in the same principal amount as Exhibit 1-A, and I take it that that is a supplemental note to take the place of the exhibit? "A. I assume it is."

Mr. Rowntree: If your Honor please, that was the note I was trying to place the other day and it now comes to me. We will have to introduce that subsequently.

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(The reading of the deposition continued.)

1114 "Q. Now, Mr. Eaton, I notice that the shares of stock, collateral for the 1960 note, are the same as in the 1958 note, which is the exhibit. Has that number of shares of stock always remained that number since the loan transaction? "A. Well, unless the loan has been increased. If the loan had been increased, there would be additional shares, but it would be the same if it's the same loan.

"Q. This number of shares of stock shown on Exhibit 1-A would reflect a value to support the note of roughly \$25 per share. Do you know if the West Kentucky Coal stock in 1960 had a value of \$25 per share? "A. I think it had an intrinsic value substantially above that. On a rather thin quoted market, it would have been lower, but since the loan was made, I think the stock on the market has sold as high as \$40 a share, and it has sold lower, but the fluctuations in the market having regard to the long time picture of the property has very little to do with its intrinsic value.

"Q. But this stock is listed on the New York Stock Exchange, the West Kentucky Coal Company stock is listed on the New York Stock Exchange? "A. Yes.

1115 "Q. And what is the value on the New York Stock Exchange, the quoted value on West Kentucky Coal Company stock per share? "A. I don't like to use the word 'value' in referring to fluctuations on the Exchange. If you mean the current quotation of small numbers of shares, I think it's around \$11 now.

"Q. Has the Union made demand for additional collateral on this note? "A. No.

"Q. When the stock represented as collateral in these notes goes up, does the Union permit you to take the stock down as in the case of the C & O stock, and if the value goes down, the Union does not make demand on you for additional shares?"

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“Q. Do you understand the question, Mr. Eaton? “A. I am not sure I got all of it.”

“The Witness: When the stock went up to around \$40 a share, there was no request for reduction of the collateral, and on the market quotations there has been no demands from the Union, because the value of the property is the coal that's in the ground, and that is not affected by fluctuations on the Stock Exchange.”

By Mr. Rowntree:

“Q. Now, Mr. Eaton, this note shows that the original note was returned to you. Were you an officer of Chertsey Corporation? “A. No.

“Q. You were handling the transaction, though? “A. Yes.

“Q. The note recites, this is Exhibit 1-A, recites that the interest shall be equal to one-half of the dividends received on the collateral securities, the West Kentucky Coal Company stock, so the interest would be, then, one-half of the dividends declared and paid by West Kentucky Coal Company? “A. Yes, sir.

“Q. Now, if the Union had bought the stock itself it could have gotten the full amount of the dividends? “A. Well, that's speculating on something—

“Q. Well, that's true, isn't it, Mr. Eaton?”

By Mr. Rowntree:

“Q. And if this was an ordinary transaction for an investment of funds, the form which it took in ostensibly putting the stock in the name of Chertsey Corporation, by the terms of this note, cuts down the possibility of return on the investment by one-half?”

Mr. Kramer: Now that question wasn't answered.

(The reading of the deposition continued.)

By Mr. Rowntree:

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"Q. Isn't that right? "A. I think I wouldn't even need the instruction of counsel on that one."

"Q. If you as an investor—and I take it that you are one of the most skillful investors in the country—wished to invest substantial amounts of money like this amount, willing to take the risk of a decline in the market value of stock, would you make it in this form? "A. That gets into questions of judgment and experience. I don't believe there is any pattern yet that determines the form of American free enterprise. Men and institutions are still allowed to exercise their best judgment. I would do what my experience and best judgment suggested at the time of the operation."

1118 "Q. Has West Kentucky Coal Company paid dividends, Mr. Eaton? "A. Yes, through a good deal of its career, it has.

"Q. And one-half of these dividends on this particular stock were paid over to the Union? "A. When the dividends were paid, yes.

"Q. Do you know how long it has been since dividends were paid? "A. I think it's a matter of two or three years.

"Q. Isn't it true, Mr. Eaton, that the right to receive dividends is a normal incident to ownership of stock? "A. Yes, it is.

"Q. And West Kentucky Coal Company has quite a few mortgages, is that right, some of which restrict its payment of dividends? "A. It has loans from banks that have some restrictions of that character.

"Q. Do you recall what the stock market price—"A. Pardon me.

1119 "Q. Do you recall what the stock market price or quotation on the West Kentucky stock was when the shares were acquired? "A. I think around \$25 a share, in that vicinity."

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"Q. But it is now something like \$11 a share?" "A. Yes.

"Q. Now, turning to Exhibit 1-B of Set 3"—this being Exhibit 56—"this is a note in the principal amount of \$2,625,000 secured by 23,000 shares of Class A five per cent preferred stock of Nashville Coal Company."

"Q. This transaction occurred, did it not, Mr. Eaton, in September, 1955?"

Mr. Rowntree: And I should say there was a correction of that amount of shares to 25,000.

"A. Yes.

"Q. And this is another case of a renewal note—"A. Was it '55 or '56?"

"Q. I believe the Union has answered that it started September 5, 1955. "A. It is not clear on this."

By Mr. Rowntree:

1120 "Q. And this involved the acquisition of the properties of Nashville Coal Company by West Kentucky Coal Company; is that right? "A. It was in connection with—yes, it occurred in connection with that.

"Q. Now, the interest is stated on here as two and one-half per cent of the amount of the principal. "A. Yes.

"Q. Now, the collateral put up in this instance, Mr. Eaton, is five per cent preferred stock of Nashville Coal Company.

"A. That is right.

"Q. And here again the Union could be required to take the collateral in satisfaction of the obligation of Chertsey Corporation? "A. Yes.

By Mr. Rowntree:

"Q. Has interest been paid on this note? "A. It may have in the earlier parts, but laterally, not.

1121 "Q. And why has it not? "A. The Nashville Company, the issuer of the notes, has been making very extensive investments in the extension and improvement of

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its properties, and in paying off the obligations it incurred in the acquisition of the properties that Nashville now owns.

"Mr. Fortas: Are you talking about dividends, Mr. Eaton?

"The Witness: I am talking about dividends, that, and cash requirements had been very substantial to meet its capital requirements both for extensions to its property and in paying off the obligations it incurred when it made the purchase."

By Mr. Rowntree:

"Q. Nashville Coal Company has not paid the five per cent of dividends on this stock? "A. No, sir.

"Q. And for that reason, Chertsey Corporation has not paid interest on this note in recent years? "A. That's right.

The interest has been accrued.

1122 "Q. So when— "A. The dividends are cumulative, of course.

"Q. So it was then your understanding with the Union that the right of the United Mine Workers to receive the interest would be dependent upon the Nashville Coal Company paying dividends on the stock? "A. Yes, that's right."

Mr. Rowntree: Mr. Kramer objects.

Mr. Kramer: The witness finally makes the statement—

Mr. Rowntree: "Mr. Kramer: I object to this question, because first, it calls for a conclusion—"

Mr. Kramer: Of course, the objection is just to get the witness straightened out. Read the answer of the witness. (The reading of the deposition continued.)

"The Witness: Then I ought to withdraw my answer.

"Mr. Rowntree: No, I don't want the answer withdrawn because I think that was the understanding, because that's the way it has been practically construed by the parties.

"The Witness: I think I misspoke in my answer there."

By Mr. Rowntree:

1123 "Q. Let me ask you this, Mr. Eaton, has the Union

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made demand upon you for this interest, or upon Chertsey Corporation? "A. No.

"Q. And the second page of that same exhibit, 1-B, that is a replacement note taking the place of the first page, I take it? "A. I assume it is.

"Q. And there the Union has allowed the interest to be carried over as an addition to principal? "A. Yes.

"Q. The unpaid interest, that is? "A. Yes."

"Q. Is there any understanding, Mr. Eaton, between you and the Union as to how long this process of replaing notes year by year will continue? "A. No, no understanding..

"Q. And there is no understanding as to how long the United Mine Workers of America may retain this collateral which is represented on the face of these notes? "A. They will retain it until their loans which they secure are 1124 paid, I would assume.

"Q. Or until you surrender the stock to the Union? "A. Yes.

"Q. At any decrease in value that may have been suffered in the interval?

"Q. Mr. Eaton, referring to this Exhibit 1-D, I take it that that transaction was part of the transaction involved in Exhibit 1-A"—1-D is Exhibit 58—"of that same set having to do with the acquisition of West Kentucky Coal Company stock by Sagamore Summit Company? "A. Yes.

"Q. Why were two different corporations used there? 1-A is Chertsey Corporation, and 1-D is Sagamore Summit Company? "A. It was done for the convenience of the two companies.

"Q. You negotiated both loans; is that right? "A. Yes.

1125 "Q. And part of the proceeds were put into Sagamore Summit and part into Chertsey, and both acquired West Kentucky Coal Company stock? "A. Yes.

"Q. And all of these were part of the same transaction?

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A. Well, they were made at different times and in different amounts.

"Q. But it resulted from the initial negotiations that you had with United Mine Workers of America? "A. It extended over a considerable period of time, and the different corporations participated at different periods in the acquisition of the stock, which went on over a long period.

"Q. Exhibit 1-A, the next page of Set 3, is a transaction in the name of Sagamore Summit Company, having to do with the acquisition of Nashville Coal Company, the same as was true with Exhibit 1-B, except that 1-B was in Chertsey Corporation; is that right? "A. Yes.

"Q. And that was part of the same transaction? "A. Yes.

"Q. Both of those two notes? "A. Yes.

"Q. Does the Union still retain as collateral the 1126 stock referred to on Exhibit 1-D and 1-E? "A. Yes.

"Q. Exhibit 1-F in Set 3"—being presently Exhibit 59—"that is your personal note secured by West Kentucky Coal Company stock? "A. Yes.

"Q. And was this part of the same transaction as Exhibits 1-A and 1-D, the latter two being in the names of Chertsey Corporation and Sagamore Summit Company respectively?"

"A. This is a note securing the common stock of West Kentucky Coal Company, and the other is something different.

"Q. This is 1-D here.. "A. 1-D?

"Q. Yes, and the other one is 1-A, the first one. "A. Well, they are all secured by West Kentucky stock.

"Q. They all result from initial negotiations with officers of United Mine Workers with respect to the furnishing of funds for acquisition or payment for these shares of stock?

"A. No, that would hardly be true, because as amounts of stock in West Kentucky were acquired, additional 1127 amounts, that occasion different discussions with the United Mine Workers on that particular—

Deposition of Cyrus S. Eaton

1128 "Q. —block of stock.

"So that you had a number or a series of conversations with the Union Officers over a period of several years? "A. Yes.

"Q. And each time the Union put up funds to pay for this stock? "A. Not always. At times we acquired stock without borrowing anything from the Union.

"Q. And 1-F-A, the next page."

Mr. Rowntree: That is presently exhibit 61.

(The reading of the deposition was continued.)

"—the same is true for that exhibit?

"Q. That this results from transactions over a period of time and the negotiations with the United Mine Workers over a period of several years? "A. Yes, that would depend on business conditions, circumstances, so that they would be the subject of negotiation and discussion from time to time.

"Q. And likewise that would be true for Exhibit 1-F-B, the next page."

Mr. Rowntree: That being Exhibit 62.

1129 (The reading of the deposition was continued.)

"A. Yes.

"Q. And also for Exhibit 1-F-C, the next page?

Mr. Rowntree: Which is now Exhibit 63.

(The reading of the deposition was continued.)

"A. Yes.

"Q. And 1-F-D?

Mr. Rowntree: Which is now Exhibit 64.

(The reading of the deposition was continued.)

"A. Yes.

"Q. And the last four pages that we have mentioned are all in Tower Industries, Inc.? "A. Yes.

"Q. Now, Mr. Eaton, with reference to the last page of that series of exhibits, which is exhibit 2, that is a note executed by Chertsey Corporation in the amount of \$550,000.

Deposition of Cyrus S. Eaton

It looks like it's dated September 13, 19 — I just can't make it out.

"Q. Did the Union furnish a date on that? "A. The one I have here looks like 1955.

"Q. Do you have any recollection of the date of 1130 that? "A. No.

"Q. Do you recall the purpose of that transaction, what was behind it? "A. I have forgotten the business conditions. The Chertsey Corporation is at times active in business things, and probably at a time when money rates were very low, when many institutions have deposits in banks on which they are getting very little interest, at times of cheap money, and the Chertsey Corporation was a company with good credit, and I suppose it was just a normal transaction, or in the nature of one.

"Q. But on this note the interest is at four per cent rather than the two and a half, as some of these other notes. "A. The interest rate is four per cent. Those rates would vary from time to time with whether we had a cheap money administration or a dear money one.

"Q. Well, we can't make out the date of that note, so that we don't know what particular time we are talking about there.

"Q. Going to the matter of the purchase of Cleveland Electric Illuminating Company, Kansas City Power and Light Company stock, Union Electric Company stock, and Hevi-Duty stock, did the Union advance funds to you, Mr. Eaton, with a view to your purchasing shares of stock 1131 in those four companies? "A. Yes."

Mr. Rowntree: This is Set 2 interrogatory 1-F, which I refer to at that point.

Mr. Kramer: Now, Your Honor, we are going to renew an objection, or make a new objection, because they are now dealing with the placing of collateral for loans of certain stock which the corporation issuing such stock, on which it

Deposition of Cyrus S. Eaton

was issued, is not claimed to be in the conspiracy at all and has no relationship to the conspiracy here. The Kansas Power and Light Company stock and others, none of which are listed or claimed to be in the conspiracy, and we object to any reference to that.

The Court: For what purpose is the testimony to be used? The same purpose?

Mr. Rowntree: Yes, sir, the scope of the conspiracy. These electric utility companies are the principal markets for coal. It is considered the nature of the conspiracy, the controls potentially exercised over the market, and this shows the purchase by the union of blocks of stocks in the utilities that constitute the market for coal.

The Court: You mean Mr. Eaton was buying this stock for the union?

1132 Mr. Rowntree: Yes, sir.

Mr. Kramer: Your Honor, may I state it is not claimed—there are some charges made that certain utilities were within the field in which these companies in this particular area could sell coal, but it is not claimed that these particular utilities who are far removed—Kansas City, etcetera — are far removed from this field, Your Honor, in which these people were possible suppliers of coal. So because somebody bought some stock and put some stock up as collateral is so far afield, wholly disconnected and far from this, we object to it for that reason, Your Honor.

The Court: Overruled.

Mr. Rowntree: The second question, the answer to that first one?

Mr. Robertson: Well, you are ready for the question there, the first question on page 66.

Mr. Rowntree: Does the record show an answer? Go ahead and answer that question Mr. Kramer raised an objection to at the top of the page.

(The reading of the deposition was continued.)

"A. Yes.

Deposition of Cyrus S. Eaton

1133 "Q. And on that transaction, Mr. Eaton, there was no reduction of the understandings between you and the Union into the form of a separate writing such as a promissory note? "A. That's right."

"Q. What was the understanding you had with the Union with respect to those advancements or loans? "A. Those transactions were in the nature of a joint undertaking, a joint participation, a case where the Union had again idle funds they wanted to put to work, and consideration of where was a good place to employ it. And the purchase of utility stocks seems a safe and desirable place to put money.

"And the Union and I collaborated in that. I was using my knowledge of the business and business opportunities, and I thought it would be mutually advantageous to do it from the standpoint of profit and interest."

Mr. Kramer: Still talking about these same stocks, and the record shows, I take it, my continuing objection, Your Honor?

1134 The Court: Yes.

(The reading of the deposition was continued.)

"Q. What was the Hevi-Duty Company? What kind of equipment did they make? "A. That was a company owned by Union Electric, and none of that stock was purchased directly, but it came as a dividend. The Union Electric, I think, was required to divest itself of that company, and it's a wholly-owned subsidiary of theirs, and they just distributed the stock to their stockholders."

"Q. And the stock which you purchased with the funds was the stock of these three utility companies which I mentioned, Cleveland Electric Illuminating, Kansas City, and Union, and these are large coal consumers? "A. Companies, yes.

"Q. They generate electricity by consuming coal? "A. That's right.

"Q. The Cleveland company, is that a large utility company? "A. Yes.

Deposition of Cyrus S. Eaton

"Q. Does it supply electricity in Cleveland and vicinity?

"A. Yes.

"Q. And the same is true for the Kansas City 1135 company? "A. Yes.

"Q. In the Kansas City area? "A. Yes.

"Q. Where is Union? "A. St. Louis.

"Q. And it supplies electricity in the vicinity of St. Louis? "A. That's right.

"Q. This agreement, did it provide that the United Mine Workers of America was to receive half of the dividends paid on the stock and half of any increase in value of the stock with an option to purchase such stock? "A. That's right.

"Q. And pursuant to that understanding— "A. The option to purchase half the stock.

"Q. All right. And pursuant to that understanding, we refer to Exhibit 2 of Set 2 — before coming to that Exhibit, when were these loans or this loan that we have been talking about with reference to the utility stocks, when was that made, if you recall? "A. I wouldn't be sure of the dates. Maybe in '56 or '57.

"Q. Now is Exhibit 2 —"

1136 "— is Exhibit 2 a terminal paper with respect to that transaction? "A. Yes.

"Q. And this is a letter dated March 14, 1960, from you to Mr. Lewis and the other individual officers as trustees of the Union? "A. Yes.

"Q. I notice, Mr. Eaton, that in addition to Cleveland, Kansas City and Union Utility companies, Tampa Electric Company is included to the extent of 10,400 shares of Tampa Electric Company. "A. 5,200.

"Q. 5,200 in the first paragraph plus 5,200 in the second paragraph? "A. Yes, that's right.

"Q. And combined together in the third paragraph is 10,400; is that right? "A. That's right.

Deposition of Cyrus S. Eaton

"Q. And Tampa Electric Company is a utility in the vicinity of Tampa, Florida? "A. That's right.

1137 "Q. And Tampa Electric Company is a utility in the vicinity of Tampa, Florida? "A. That's right.

"Q. Now, under the understanding you had with the Union with respect to this loan, the Union apparently exercised its option to purchase all of the stock? "A. Well, I think they didn't have an option to purchase more than half, but these stocks are readily marketable. They can be distributed over the Stock Exchange or in an hour's time, and it seemed expedient to me to sell these stocks at that time. And it was a question of whether the Union desired to purchase them. They would have the first opportunity, and they elected to take all the stock.

"But it's securities that are instantly marketable, highly liquid, and it was just a matter of preference on their part whether they purchased the stock, or—from my standpoint, it seemed to be an opportune time to do this.

"Q. Doesn't this Exhibit 2 reflect the exercise of the rights of the parties under the understanding you had with the Union? "A. That's right, only as to half of the stock.

"Q. In the first paragraph, they have purchased there one half of the stock at cost? "A. That's right.

"Q. And in the second paragraph they have purchased there one-half of the stock at cost? "A. That's right.

"Q. And in the second paragraph they have purchased one half of the stock at the market value at the time of their purchase? "A. That's right.

"Mr. Fortas: I don't understand your reference to one-half of the stock would expect to be purchased at market value.

"Mr. Rowntree: The market value concerns the second paragraph—

"Mr. Fortas: Yes, but I don't understand your reference to one half of the stock in connection with the second paragraph.

Deposition of Cyrus S. Eaton

"Mr. Rowntree: This one-half there is equivalent to the one-half in number of shares contained in the first paragraph.

"Mr. Fortas: I beg your pardon, it is not. If you will look at Cleveland Electric Illuminating Company, for example, it's 6,000 in the second paragraph and 10,000 in the first.

"Mr. Rowntree: I see the difference there.

"Mr. Fortas: Yes."

1139 "Q. Now, isn't it true that those shares of stock which you retained were merely the compensation which you acquired under the understanding with the Union for negotiating the transactions? "A. No, no, no.

"Q. Isn't it true, Mr. Eaton, that this transaction which was entered into without any written understanding between you and the Union, really reflects the understanding which you had with the Union with respect to these transactions that had to do with the West Kentucky Coal Company stock and the C&O Railway Company stock? "A. No, they are entirely separate and distinct things. One has no relation to the other.

"Q. And isn't it true, Mr. Eaton, that the results of those transactions have come out the same as this last transaction which relates to the Utility Company stocks? "A.

1140 No.

"Q. Except that the Union has not yet told you that it will buy outright in its own name these shares of stock in C&O Railway and West Kentucky Coal Company? "A. That is a complete misstatement of the fact. There is not a vestige of truth or reality in it.

"Q. And isn't it true, Mr. Eaton, that the Union will continue to hold these shares of stock in C&O Railway and in West Kentucky Coal Company as so-called collateral until it decides that it is time to exercise its right to purchase?"

Deposition of Cyrus S. Eaton

"A. I don't know what the union will have in mind, but your construction of it hasn't the vestige of truth in it.

"Q. Isn't it your understanding which you have with the Union? "A. No.

1141 "Q. The transactions which you have had with the union with respect to the C & O stock have been of benefit to you and to your companies which we have talked about here? "A. The transactions have been constructive. They have been mutually advantageous. But in these instances I have contributed my know-how and that of my associates. The Union have loaned money when they thought it was advantageous from a monetary standpoint to do so. And they are all highly constructive and good business for the Union. And I think that the mutual contribution from a financial standpoint has been constructive and sound."

"Q. The United Mine Workers of America, Mr. Eaton, has a very strong interest in the management—in how the management of West Kentucky Coal Company carries on?

"Q. Will you answer, Mr. Eaton? "A. I think my
1142 answer is, I don't know.

"Q. Well, isn't it true, Mr. Eaton, that the United Mine Workers has many millions of dollars invested secured by this West Kentucky Coal Company stock? "A. That's right.

"Q. And isn't it true, Mr. Eaton, that the United Mine Workers of America have supplied several million dollars of assets to secure a bank loan to the West Kentucky Coal Company? "A. I don't know.

"Q. You are chairman of the Board of the West Kentucky Coal Company? "A. Yes.

"Q. And if such a loan has been made, would not the chairman of the Board know about it? "A. Well, I know all about the loans of West Kentucky, but I don't know about what you are talking about.

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1143. "Q. If such a loan has been made secured by a pledge of Union assets, and in the light of these other numerous transactions relating to West Kentucky Coal Company stock, is it not true, Mr. Eaton, that the policies of the Union would be abided by by the management of West Kentucky Coal Company? "A. Not at all.

"Q. You mean that the management of West Kentucky Coal Company would pay no attention whatsoever to suggestions or instructions from the United Mine Workers of America? "A. They have never offered anything. That would be a question that would arise if any suggestion were made."

* * * * *

"Q. You don't know about the intimate details of the management of the West Kentucky Coal Company? "A. Yes, I do.

* * *

"Q. You are not familiar with all the transactions that West Kentucky Coal Company has had with the United Mine Workers of America? "A. Well, I suppose in a sense that is true, because they have frequent contacts between the active management and the Union relating
1144 to ordinary questions that arise between management and labor unions. Those are handled under Mr. Easton's direction, who is on the job. But I am familiar with the financial position of West Kentucky, and with its bank loans and who has participated in them.

"Q. And the United Mine Workers of America have made no suggestions nor stated any proposed policies with respect to West Kentucky Coal Company, even though it has all of these funds invested in that company? "A. That's right."

Mr. Rowntree: That is all of the deposition that we will read.

Mr. Kramer: Just a moment. At the last point counsel asked a number of questions of this witness on whether or not he was interested in certain companies, and I want to refer to some of those only. Not the whole page.

Deposition of Mark Eastin

"Mr. Eaton, are you interested in any of these companies"—and he lists them. Pittston Company. Answer is no.

Consolidated Coal Company. His answer is no.

There are others but I don't think they have been referred to in this record. I am trying to refer to the ones shown in this record.

Mr. Rowntree: Peabody.

1145 "Do you or any of your companies have any interest in Peabody Coal Company?

"No.

"Do you or any of your companies have any interest in Pittsburgh & Midway Coal Company?

"No.

Next is the deposition of Mark Eastin taken at the offices of West Kentucky Coal Company, Madisonville, Kentucky, October 13, 1960.

• • • • •
"MARK EASTIN

the witness, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Eastin, where do you reside? "A. 134 Union Street, Madisonville, Kentucky.

"Q. That is more than 100 miles from Knoxville, Tennessee? "A. Well, about 300, I think.

"Q. What is your official position? "A. President of the company and I am a director of the company.

"Q. And how long have you held each of those
1146 positions? "A. Well, I was elected president of the company on March 16, 1956, and was elected a director before that, which was December 11, 1951.

"Q. Mr. Eastin, do you recall what was the first date that West Kentucky Coal Company signed the National

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Bituminous Coal Wage Agreement with United Mine Workers? "A. March, 1954; March 1, 1954.

"Q. Has West Kentucky Coal Company been a signatory to the National Bituminous Coal Wage Agreement since that time? "A. Yes.

"Q. Continuously? "A. Yes.

"Q. Do you sign for the company one contract with the union or do you sign one for each of the mines? "A. Well, Mr. Love, who is now deceased, who was president of the company, signed the first contract and that was signed by the West Kentucky Coal Company. I later signed a contract; that was at the time of extension of this contract when a new contract was negotiated; for all companies. We now are members—for all mines I should have said instead of companies. We are now members of the Western Kentucky Coal Producers Association, which is a local coal operators association here, and they signed for us the last time.

1147 "Q. Does Nashville Coal Company, Inc. also sign a contract with the Union? "A. Yes, we sign Nashville Coal Company to a contract.

"Q. Does West Kentucky Coal Company have any other operating subsidiary corporations? "A. Yes, we operate what is known as River and Gulf, which is a river transportation company, and we have a dock near New Orleans.

"Q. That is in the transportation business rather than the coal mining business? "A. That is right.

"By Mr. Wheeler: River and Gulf Transfer Co. is its corporate name. "A. We do still have St. Bernard Coal Company, but it is not active. We use it in sales some but it doesn't produce any coal.

"Q. Does River and Gulf Transfer Co. sign a contract with United Mine Workers? "A. No.

"Q. When did West Kentucky Coal Company acquire the stock, the common stock, of Nashville Coal Company, Inc.? "A. Well, they actually acquired the stock in Nashville Coal Company and then we organized Inc. to hold it.

Deposition of Mark Eastin

Isn't that right? (to Mr. Wheeler)

1148 "By Mr. Wheeler: No, sir. May I tell him?

"By Mr. Rowntree: Yes, sir.

"By Mr. Wheeler: The West Kentucky Coal Company organized Nashville Coal, Inc., a subsidiary, a Kentucky corporation, which acquired all of the capital stock of Nashville Coal Company and thereafter dissolved Nashville Coal Company.

"A. That is what I said or what I thought I said. Those negotiations were terminated or concluded, or completed I should say, completed on the 13th of September, 1955, and we took over the properties on October 1, 1955.

"Q. I have here copy of West Kentucky Coal Company's Annual Report in 1958. Would you look at that Mr. Eastin, and see if that is a copy of the company's annual report for that year. "A. That is right.

"Q. And the statements contained in here are true, of course? "A. To the best of my belief and knowledge, yes, sir."

Mr. Rowntree: I would like to file that as the next exhibit, the West Kentucky Coal Company Annual Report of 1958.

(Exhibit No. 69 was marked for identification and filed.)

Mr. Rowntree: And I would like to pass that to
1149 the jury. It has got a little map in here that might be of interest.

Mr. Kramer: You are referring particularly to some particular page in it?

Mr. Rowntree: Inside of the cover page. And I would like to refer to small extracts from that report.

The Board of Directors listed on page 1. Hugh B. Baker, Wm. R. Daley, Mark E. Eastin, Jr., Cyrus S. Eaton, Cyrus S. Eaton, Jr., R. L. Kaiser, Fay A. LeFevre.

Page 2, statement of the Chairman of the Board, Mr. Cyrus S. Eaton and the President, Mr. Mark E. Eastin, Jr.

"The general business recession of 1958 affected the coal industry with especial severity. National production de-

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clined 18.8% from the previous year, while national sales decreased 19.45%. The corresponding percentages for your Company were 9.5% and 14%, significantly better than the national average. All indications for 1959 point to improved activity for business generally, and for the coal industry and your Company particularly.

"Cash income of West Kentucky Coal Company 1150 and its wholly owned subsidiaries, Nashville Coal, Inc., and River and Gulf Transfer Co., totaled \$2,518,999 in 1958. Net loss amounted to \$204,516.

"A dividend of 25¢ per share was paid on West Kentucky's common stock in 1958, and two dividends were paid on the preferred stock, one on January 1 and the other on April 1, 1958. In the light of business conditions, payment of further dividends was deferred.

1151 "During the year total long-term debt was reduced \$3,441,303. Net addition to property, plant and equipment amounted to \$1,664,711, while depreciation and depletion totaled \$2,723,515.

"Production from the properties and leases of your Company and its subsidiaries totaled 6,984,695 tons. Sales of coal of our own production and from mines operated by others, after eliminating inter-company sales, amounted to 7,554,539 tons.

"During the year 15 jumbo barges were delivered to River and Gulf Transfer Co., a wholly owned subsidiary. This gives our river transportation department a modern fleet of three towboats (one 5400 h.p. and two 3200 h.p.), 13 mammoth steel barges and 31 jumbo steel barges, for use in our transportation program on the Mississippi, Ohio, Tennessee and Cumberland Rivers."

On page 4:

"Your Company owns 6 modern coal mines, with an annual capacity of 7,200,000 tons. At today's cost of \$7 per ton for developing a mine, including the installation of machinery and equipment, this represents a value of more than \$50,000,000. Your Company possesses proven reserves

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in excess of 1,000,000,000 tons, more than half of which is strategically located on or near the Ohio and 1152 Green Rivers. In the 89 years since West Kentucky and its predecessor company started business, your Company has built up an impressive and diversified roster of customers, which now includes leading Middle Western electric utilities; chemical, cement and other industrial users; an important Canadian clientele; and a strong group of retail and wholesale distributors to the commercial and domestic markets in the Great Lakes area, as well as the South. Thus, from the vital standpoints of production, reserves, transportation and marketing, your Company stands well prepared to take full advantage of improving and expanding business."

The statement of the consolidated balance sheets, particularly on page 7:

Loss before taxes in income or income tax credit, 1958, \$367,516.

The federal income tax carry-back, loss carry-back credit amounted to \$163,000.

Loss before cumulative unpaid dividends on preferred stock of subsidiary was \$204,516, in 1958.

That is all we desire to read from that exhibit.

(The reading of the deposition continued.)

"Q. I show you, Mr. Eastin, a copy of West Kentucky Coal Company Notice of Annual Meeting of Stockholders and Proxy Statement, pertaining to the Annual Meeting of Stockholders, May 12, 1959, and ask you if that is a copy of those statements? "A. That is correct."

Mr. Kramer: Your Honor, we are going to object. We do not object to '58, which was in the period of course, but we do object to '59 statements, because it is beyond the period of the alleged conspiracy.

The Court: Whatever bearing it may have on the status of the company during the period involved in this suit, the

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Court permits it as evidence. Any other period will not be considered.

Mr. Rowntree: I should have read in connection with the last exhibit, your Honor, on page 6:

"Common stock outstanding, 857,264."

We offer as the next exhibit this proxy statement for the 1959 meeting, as Exhibit 70.

Mr. Kramer: That is the exhibit to which I referred a moment ago, which I objected to and to which I continue to object. He dropped back to the other exhibit, to which there was no objection. Is that correct?

Mr. Rowntree: That is correct.

Mr. Kramer: Your Honor has ruled on this.

1154 (Exhibit No. 70 was marked for identification and filed.)

Mr. Rowntree: I will read an excerpt from that, on page one, last paragraph:

"The outstanding voting securities of the Company consist of 50,000 shares of 5½% Cumulative Preferred Stock and 857,264 shares of Common Stock, par value \$4.00 per share, each of which shares is entitled to one vote. Holders of Preferred and Common Stock of the Company of record at the close of business on April 21, 1959, will be entitled to vote at the meeting."

The officers, the directors of the company begin on page two and their proportionate holding.

Hugh B. Baker, 1,000 shares.

William R. Daley, 1,000 shares.

Mark E. Eastin, Jr., president of the company, 100 shares.

Cyrus S. Eaton, 87,600 shares.

Cyrus S. Eaton, Jr., 1,000 shares.

R. L. Kaiser, 100 shares.

Fay A. LeFevre, 1,000 shares.

There are notes after the name of Mr. Eaton.

"Note (a). Represents 10.22% of the Company's Common Stock; Mr. Eaton also owns of record, but not

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1155 beneficially, 27,142 shares, or 3.17%, of the Company's Common Stock."

There are notes after the names of Mr. Daley, Mr. Eaton, Mr. Eaton, Jr., Mr. Kaiser and Mr. LeFevre to this effect:

"(b) In addition, Chertsey Corporation, which under the proxy regulations of the Securities and Exchange Commission is an associate of Messrs. Eaton, Eaton, Jr., Kaiser, and LeFevre, own, respectively, 84,912 shares and 59,928 shares of the Company's Common Stock; Otis & Co., which under the aforementioned regulations is an associate of Messrs. Daley and Kaiser, owns of record, but not beneficially, 50,000 shares of the Company's 5½% Cumulative Preferred Stock, being all the issued and outstanding Preferred Stock of the Company."

Mr. Kramer: Your Honor, in order that you may understand my objection, the statement is made that this was true as of the date in April—I have forgotten the exact date—April 21, 1959. It does not disclose stock ownership in '58 or any of the previous years. Of course, it is our position that allocation of stock ownership in 1959 could have no bearing on this lawsuit.

The Court: No, unless the status existed—sub-
1156 stantial status existed during periods involved during period involved in this suit. What does the record show about that or what do you propose to show in the record? Was there any substantial change from December 31, 1957 to April of 1959?

Mr. Rowntree: The only changes, something was done with respect to the union's preferred stock.

Mr. Kramer: Just a moment. I know counsel doesn't intend to be incorrect, but the ownership of shares by individuals was not the same, and there is no showing here that the ownership of the number of shares—counsel has read number of shares owned by different individuals as of April 21. What he has said, he is correct with reference to loans of United Mine Workers. I don't dispute that. There was some change there as already indicated, but the number of

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shares owned by different stockholders was not identical.

Mr. Rowntree: The deposition goes into that. It is some relative change between the Chertsey Corporation and Sagamore Summit or something like that. It ends up with the same total number of shares.

Mr. Kramer: It ends with the same, the corporation had the same number of shares outstanding, that we do not deny, but we do say the division of ownership is not competent as of April 1959.

The Court: No, not unless it existed on December 31, 1958. That is the date, the terminal date of this lawsuit insofar as the question of damages is concerned. The beginning date was February 14, 1954, insofar as the question of damages, if you get to that subject, is involved.

Mr. Rowntree: One last paragraph here, there are footnotes after the names of these board of directors, Eaton, Eaton, Jr., Kaiser and LeFevre:

"(c) In addition, Chertsey Corporation, as aforementioned associate of Messrs. Eaton, Eaton, Jr., Kaiser, and LeFevre, holder of 25,000 shares, Sagamore-Summit Co. and Tower Industries, Inc., as aforementioned associates of Messrs. Eaton, Jr., Kaiser, and LeFevre, holders of 10,000 shares each, own all the issued and outstanding Preferred Stock of Nashville Coal, Inc., a subsidiary."

That is all we desire to read from that exhibit.

(The reading of the deposition continued.)

"Q. And what is contained in here is true; of course?

"A. It was true to the best of our knowledge at the time. Now the information in there is furnished, part of the information, by the directors, and there is a slight inconsistency in the record. I don't believe it has any consequence. If you would like to know what it is, I can outline it for you.

"Q. Go ahead and explain it.

"A. Well, Cyrus Eaton, Fay A. LeFevre and R. L. Kaiser reported preferred stock of Nashville Coal Company owned by their associates as follows: That was Chertsey

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Corporation 25,000 shares; Sagamore-Summit Co. 10,000 shares; Tower Industries, Inc. 10,000 shares. The stock records show—

“Q. Is that stock of West Kentucky or Nashville Coal, Inc.?”

1159 Mr. Kramer: Your Honor, of course, our objection is continuing, because again we are talking about April, 1959, for the reasons heretofore given, object to even listing them.

(The reading of the deposition was continued.)

“Q. I would like to mark this as Exhibit 2 of the deposition.”

Mr. Kramer: That is Exhibit 70, is what you had Exhibit 2.

Mr. Rowntree: Yes.

(The reading of the deposition was continued.)

“Mr. Eastin, you have referred to this Nashville Coal, Inc., preferred stock. Is that voting stock or not?”

“A. Yes, it is voting stock.

“Q. Do you know whether or not the voting rules of Nashville Coal, Inc., require for a resolution to be adopted that it requires the majority vote of both classes of stock, preferred and common?”

1160 “A. Not off hand, no, I don't know.

“Q. You don't know?”

“Mr. Wheeler: There is no such requirement.

“A. Let that be my answer then; there is no such requirement.

“Q. All right. Do you know how many shares of common stock are outstanding of Nashville Coal, Inc.?”

“A. Of common stock, we have 262,500 shares of Nashville common stock outstanding.

“Q. And who owns those shares?”

“A. Well, let's see.

Deposition of Mark Eastin

Mr. Wheeler: West Kentucky Coal Company.

"A. Well, of course, I was thinking about the preferred.

"Q. I should have pointed out the distinction there.

"Mr. Wheeler: I might say, Mr. Rowntree, that under the existing law of Kentucky, it is not necessary for a director to own stock as formerly was required.

"Q. Now the common stock of West Kentucky
1161 Coal Company, the common stock, is subject to two mortgages, I believe; one to Mr. Potter and one to Irvin Trust Company as Trustee and the Liberty Bank of Louisville?

"A. That is substantially correct, yes.

"Mr. Wheeler: The question and the answer are not exactly accurate in this; that the assets of West Kentucky Coal Company are converted by the mortgage you refer to under which Irvin Trust Company of New York and Liberty Bank and Trust Company of Louisville are Trustees.

"A. You can let that be my answer if you will accept it.

"Q. Now the Annual Report for '58 of West Kentucky Coal Company, Exhibit J, recites, just so that we can get the clearest picture, and I will ask you if this is not so, Exhibit 1 on the last part in the first full paragraph at the top of the page under Note A in the lefthand column:

'Mortgage notes payable (principal amount of \$6,-
1162 436,025) of Nashville Coal, Inc., are secured in part by real and chattel mortgages on properties of Nashville Coal, Inc., and by pledge by the Parent Company of the outstanding Common Stock of Nashville Coal, Inc.'

That statement is true, I believe?

"A. To the best of my knowledge it is.

"Q. Does that represent a transaction related to the purchase of the company by West Kentucky?

"A. Yeah.

"Q. And so Mr. Jet Potter is the obligee on the obligation referred to there?

Deposition of Mark Eastin

"A. That is right; he and his associates.

"Q. Now on the next to last page of the Exhibit 1 at the bottom of the page, it is stated 'The Series A and B and six per cent Secured Promissory Notes' and this refers to, I believe, the Irvin Trust Company mortgage?

"A. That is right.

"Q. 'Are secured under the provisions of a mortgage dated December 30, 1957, by (a) all of the Company's real property, including all of its coal reserves, and substantially all of its structures, machinery, equipment, and fixtures; (b) the pledge of the outstanding Common Stock of its subsidiary, Nashville Coal, Inc., subject to a prior pledge of such stock; and (c) the pledge of notes secured by a 1163 mortgage, issued to the Company by its subsidiary, River and Gulf Transfer Company, in the aggregate principal amount of \$7,768,000.'

And it goes on to further describe that mortgage. Those statements are correct?

"A. To the best of my knowledge and belief, yes, sir."

Mr. Kramer: So there will be no misunderstanding, you are saying Exhibit 1, and are really referring to Exhibit 60 in this present record?

Mr. Rowntree: That's correct.

(The reading of the deposition was continued.)

"Q. Mr. Eastin, has the West Kentucky Coal Company of Nashville Coal, Inc., made analysis of the profit of coal sold by those companies to the Tennessee Valley Authority in recent years?

"A. No.

"Q. You have not made an analysis of the profit?

"A. No, sir.

"Q. Going back to the Proxy Statement, Exhibit Two—"

Mr. Rowntree: Which would be 61.

Mr. Kramer: Seventy.

1164 "Q. You have not made an analysis of the profit?

"A. No, sir.

Deposition of Mark Eastin

"Q. Going back to the Proxy Statement, Exhibit Two, on the books of the Company, does Otis and Company own the five and a half Cumulative Preferred Stock of West Kentucky Coal Company, as shown in Note (b) at the top of page 3?

"A. Otis & Company acquired that 50,000 shares of preferred stock for an undisclosed party. Your question was do they still own it?

"Q. Do the books of the Company show that they own it?

"A. No. On December 15, 1959, Mr. Dooley, who was Trust Officer of the National Bank of Washington, called here—well, before that we had a letter from Mr. Dooley, instructing us to transfer that stock to Mr. John L. Lewis, Tom Kennedy and John Owens, International Officers of UMWA. However, a day or so following that, we had a call from Mr. Dooley, in which he changed those instructions and instructed us to issue those certificates to Hanab Company, in care of the Trust Department, National Bank of Washington,

D. C., and those instructions were compiled with and 1165 so Hanab is now the holder of that stock.

"Q. And before these instructions that you have mentioned, Otis and Company was shown as owner?

"A. That is right.

"Q. Did the beneficial interest of some other party also reflect itself on the books?

"A. Not as far as I know of.

"Q. Are you acquainted with the number of shares of common stock of West Kentucky Coal Company that are owned by the United Mine Workers of America or some officer in the United Mine Workers of America?

"A. There is no stock of record in so far as our books are concerned, that is owned by United Mine Workers of America or an officer of United Mine Workers of America.

"Q. Do you know if they own any shares, common shares of West Kentucky beneficially in the name of somebody else?

"A. I have no knowledge of that.

Deposition of Mark Eastin

"Q. Now, Mr. Eastin, West Kentucky Coal Company operates mines in West Kentucky?

"A. That is right.

"Q. And Nashville Coal, Inc., also has mines in West Kentucky?

"A. Yes.

1166 "Q. Are the operations of the mines of both of those companies integrated so far as the operating control is concerned?

"A. That is correct.

"Q. Is the coal from these two mines, or from the mines of these two companies sold by a common selling agency?

"A. That is right; separately and we still sell some coal Nashville Coal Company, and we still sell some West Kentucky Coal Company, and sometimes West Kentucky Coal Company sells coal from the Nashville mines and sometimes Nashville Coal Company sells coal from the West Kentucky mines. The offices have been put together. We still have stationery for both companies.

"Q. Now there is a little map here on the second page of Exhibit 1. Is that map substantially true?

"A. Yes, that is a very small scale map, but it is substantially true, and it is — that map right there (indicating a large map on the wall) with the railroads added and so on.

"Q. And you are referring to a large map on the wall here?

"A. Yes.

"Q. Are there any mines that have been opened since the map was prepared, as reflected in Exhibit 1 here?

"A. You mean by our company?

1167 "Q. By either West Kentucky or Nashville Coal.

"A. No.

"Q. Are all of the mines that are on the map still in operation?

"A. No. Let me see what mines are on the map. Atkinson mine is closed and the New Shamrock mine is operated by Badgett Mine Stripping Company on our property. Now

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to correct my answer before, that mine opened, well, they had started work on it in '58. That is the only mine that has been closed that is shown on there, Atkinson mine.

"Q. Now are these all deep mines?

"A. Yes, except that New Shamrock mine. It is a strip mine.

"Q. Is that one of those that closed? Did you mention that just a while ago?

"A. Well, it has just been recently opened, and it is a strip mine.

"Q. Oh, I see. And that is located over near Providence?

"A. That is right.

"Q. In your underground mines, are these mechanical mines or which ones are mechanical?

"A. They are all mechanical and have been for years.

"Q. The Uniontown mine is located over on the Ohio river?

1168 "A. Correct.

"Q. Do you have continuous mining machines in any of your mines?

"A. We have one continuous mining machine. It is presently being operated in Fies mine. We have tested and are constantly testing new machinery, and that machine is being operated more or less as a guinea pig.

"Q. Which mine is it in?

"A. Fies mine.

"Q. Fies mine. Now what company puts out that machine?

"A. Goodman; that one.

"Q. Will you describe the operation of that machine; how it gets the coal out?

"A. Well, it eliminates the shooting, drilling and undercutting and just heaves—well, that is not a good word, I don't want to use that; it mines the coal from the face by cutting bits and pressure applied.

"Q. Does it mechanically load the coal itself?

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"A. Yes, it comes on back on a conveyor and loads it into a shuttle car.

"Q. How many men are needed to tend that machine at the face?

"A. I don't recall right now, but I would guess about five as compared to about eleven in a crew on a conventional mechanical unit.

"Q. And by conventional mechanical unit, what type of unit would that be? How would it operate?

"A. Most of ours are Joys.

"Q. How does that operate?

"A. Well, you go back to the cycle of drilling, shooting and undercutting and then you gather the coal in with arms and it is conveyed back to the shuttle car.

"Q. Is all that done by a machine?

"A. Oh, yeah.

"Q. I see.

"A. But that is nothing new. It has been in existence in the field for many years.

"Q. How long has this continuous mining machine that you referred to been in?

"A. I would guess we have had it about three years.

"Q. It was not introduced into the industry until recent years?

"A. That is right. Possibly I should point out that that continuous miner will not produce with as small a crew as much coal as coal from a conventional type unit.

"Q. I believe you used the ratio of five to eleven? "A. That would be my guess.

"Q. Number of men tending the new machine as compared to the old Joy? "A. Yes.

"Q. And what is the ratio of production between the two machines? "A. Well, it might be slightly better on tons produced per man at the face, but to date, only very slightly better.

"Q. Is that because of any peculiar condition in the Fies mine? "A. No. I would say it is principally because the

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machine breaks down a lot; down time on that machine. Goodman won't want to hear that. And you do have a problem of getting the coal away from the machine; in other words, you have got to keep that machine running all the time, and you can't keep a shuttle car under the loading boom at all times.

"Q. The Goodman machine, does it have counterparts put out by other companies? "A. Well, their competitors have continuous miners on the market.

"Q. And who are their competitors? "A. Well, chiefly Jeffrey and Joy.

"Q. Have you tried the continuous miners of either of those companies? "A. No; we have been watching them in operation in other mines.

1171 "Q. And what other mines are those? "A. I don't know; You will have to talk to the Operating Department. They are constantly following up. Some of the mines are in Illinois and some of them are over in the East.

"Q. Do all of your mines have mechanically operated conveyor belts to convey the coal from the face? "A. Well, the coal is first loaded in shuttle cars and it conveys it to the conveyor belt, and then the conveyor belt conveys it on out. That is on part of the mines. The other mines, some of our mines are track haulage, part track haulage.

"Q. And what kind of locomotion do you use? "A. Electric locomotives.

"Q. Is that trolley? "A. Yeah.

"Q. Yes, sir. "A. We had the first all-belt mine in the industry, and that goes back to 1940, the first all-belt mine in the industry.

"Q. In which mine? "A. That was North Diamond. It is now closed.

"Q. How many of your mines are located accessible to water transportation? "A. Directly accessible only Uniontown. It has a conveyor that runs out to the river
1172 bank. The other mines are accessible by a rail move-

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ment to Grand Rivers, Kentucky, or to some of the other docks that are located on rivers.

"Q. What railroad services? "A. I. C. Railroad. Both the I. C. and L&N service all of our mines except Uniontown. It has no rail connection.

"Q. Exhibit I states, Mr. Eastin, on page 4, that you have an impressive and diversified roster of customers, which now includes leading Middle Western electric utilities; chemical, cement and other industrial users; an important Canadian clientele; and a strong group of retail and wholesale distributors to the commercial and domestic markets in the Great Lakes area, as well as the South.

Who are your Middle Western electric utility customers?

"A. I don't think I should reveal that.

"Q. All right, sir. "A. That is confidential information. That is pretty generally known in the trade who we are selling and who we are not selling, but I don't think we should give you a list of our customers.

"Q. This statement is true, though, this general statement? "A. Yes, that is our opinion of the situation.

1174 "Q. Also the Annual Report on page 5 shows the picture of a tug pushing barges down to the Memphis Generating plant. Is that one of your customers, may I ask that? "A. Yes, sir.

"Q. On the West Kentucky preferred stock, that is voting stock, is it not? "A. It becomes voting stock when dividends are in arrears and they are in arrears at the present time, so it is voting stock.

"Q. Do you know how many years the dividends have been in arrears to make it voting stock? "A. Let's see, I think I have that here somewhere. The arrearage at June 30, 1960, on West Kentucky preferred was \$309,375.00.

"Q. Was it in arrears at the time of the annual
1175 meeting of stockholders in 1959? "A. Yes. That arrearage dates back to April 1, 1958.

"Q. Was the 1958 meeting of stockholders held before

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or after April, 1958? "A. It was held on May 12, I think it was. That was May 12, 1959. I can get that. Do you want me to get that checked?

"Q. Yes, if you will. "A. It was Tuesday, May 13, 1958.

"Q. Mr. Eastin, will you tell us what the purpose of the loan transaction was on December 30, 1957, involving the Irvin Trust Company—Liberty Bank of Louisville transaction? "A. What the purpose of it was?

"Q. Yes, sir. "A. Well, we needed the money in connection with our business and the continued pursuit of our business.

"Q. Did you use a substantial part of the proceeds in connection with water transportation development? "A. Yes.

"Q. What was that work that was done with those proceeds? "A. Well, we have a dock, a transfer facility, located at Wood Park, Louisiana, which is about thirty 1176 or forty miles below New Orleans, and that facility ran several million in itself. We bought barges, steam boats or tow boats, not steam boats; tow boats; and just the natural course of events.

"Q. Was the substantial part of the cost of that construction in Louisiana paid from the proceeds of this loan? "A. Well, I don't know whether it was definitely paid from the proceeds of that loan or not, but that money went into the treasury of the company and it was used as needed.

"Q. This was one of the obligations confronting the company at that time? "A. Well, I would have to check the records; I don't know what the status was at the time.

"Q. At the time of this loan transaction December 30, 1957, the work was in progress on the loading facility in Louisiana and this was part of the obligations confronting the company and its subsidiaries and you needed working capital at that time, resulting from this and other things?

"A. I will say that is substantially correct but I don't want to say it is definitely correct unless I check my records and see what the status of all that was at the time.

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1177 "Q. All right. Do you know if the work was in progress at that time on the transfer station? "A. I think it was in progress. I don't think it had been completed.

"Q. And what was the purpose of that transfer station?

"A. When we bought Nashville Coal Company they had a contract with Tampa Electric Company, Tampa, Florida, for the movement of coal from the Uniontown mine to Tampa. Of course, that coal had to move downstream in barges and then be transferred somewhere down there to ocean going vessels, and the purpose of that transfer facility was primarily to transfer that tonnage of coal.

"Q. Did you also construct unloading facilities at the Tampa Electric Company site? "A. That is correct.

"Q. At approximately the same time? "A. That is correct.

"Q. Did West Kentucky Coal Company ship coal on the contract that you referred to, to Tampa Electric Company?

"A. No coal was ever shipped on that contract.

"Q. Was the contract rescinded? "A. It has been cancelled by letter from the Tampa Electric Company.

1178 "Q. What use is being put to the transfer facilities in Louisiana at the present time? "A. It is presently under lease to Peabody Coal Company, who are moving some coal to Tampa Electric, and they are also handling some outside commodities, the extent of which I don't know.

"Q. Is that leased to Peabody Coal Company itself? "A. Yes, sir.

"Q. Do they have their own water transportation facilities? "A. Yes.

"Q. Did Peabody Coal Company assume any of the obligations of West Kentucky Coal Company when it leased that property? "A. I don't know what you mean by that. They assumed no obligations that I know of. What do you mean by that question?

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"Q. West Kentucky Coal Company has certain notes that it is confronted with. "A. Oh, no.

"Q. The Peabody Coal Company did not assume any of those? "A. No. What I referred to there was they have an obligation to return that facility to us in as good a condition as it was when it was leased to them, normal wear and tear excepted. That is an obligation.

1179 "Q. Does Peabody Coal Company pay rental for the facilities? "A. That is correct.

"Q. This is below New Orleans? "A. That is correct.

"Q. Do you know offhand what the rental is that they pay? "A. Not offhand; it is a sliding scale proposition. It is some detail. I could refresh myself on it. However, I think that is confidential information. I don't think it should be made public to the trade, and I see that a lot of this stuff is being put in the papers.

"Q. This sliding scale is based on tonnage that goes through the facilities? "A. Yes, with some minimums.

"Q. Does West Kentucky Coal Company or Nashville Coal Company lease any property to Peabody Coal Company besides the water facility? "A. Yes; we have for many years leased coal lands to Peabody Coal Company. The Homestead mine which was the biggest strip mine and I suppose the biggest mine south of the Ohio river, which is now worked out, was a lease with Peabody. They are in the stripping business. We are in the underground business and consequently we have dealt with them for years, and others.

1180 "Q. Is the Ken mine on West Kentucky property under lease to Peabody? "A. No, the Ken mine is not on West Kentucky.

"Q. What is the production of Uniontown mine? "A. Well, its capacity is supposed to be 1,700,000 tons a year but we have not maintained that rate of production down there. We are still working at it.

"Q. Do you know how close you have gotten to it? "A.

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Well, for short periods we have run at that rate of production.

"Q. You are talking about breakdowns and things like that? "A. Yeah, and our tonnage just being off due to conditions in the mines, being more difficult at times than others.

"Q. And I believe that above the Uniontown mine loading point on the Ohio river, in that area, is Lock No. 48, Lock and Dam No. 48, operated by the Corps of Engineers?

"A. That is right.

"Q. And below the Uniontown loading point there is Lock and Dam No. 49? "A. That is right.

"Q. Now the coal from Uniontown mine, has it been moved to Tampa on the Peabody coal contract? "A. No, there has been no coal moved from the Uniontown 1181 mine to Tampa on the Peabody contract.

"Q. Has there been any coal mined by West Kentucky or Nashville Coal Company that went to Tampa on the Peabody coal contract? "A. No.

"Q. Did West Kentucky Coal Company or Nashville Coal Company at any time have any arrangement with Peabody Coal Company to ship coal to Tampa Electric Company?

"A. Yes, we have an arrangement to participate in that business with them but no coal has moved on it yet.

"Q. Did West Kentucky Coal Company or Nashville Coal Company obtain a contract from the Memphis Generating Plant that was constructed recently, in recent years? "A. That is correct; a right substantial portion of that business.

"Q. May I ask did the Kirkpatrick Coal Company also obtain a contract? "A. Yes, they obtained an order and we are shipping that tonnage for them.

"Q. Did Peabody also, did Peabody Coal Company also obtain an order? "A. They did.

"Q. Is Peabody Coal Company shipping coal to Memphis? "A. They have shipped coal to Memphis off and on, yes.

1182 "Q. Is there any arrangement with Peabody Coal

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Company by West Kentucky or Nashville Coal Company for the West Kentucky and Nashville Coal Companies to ship tonnages allocable to Peabody Coal Company for the Memphis Plant? "A. Yes, we are now shipping part of Peabody's tonnage, part of Peabody's order to the Memphis Plant in lieu of movement of coal to Tampa to facilitate matters. That will probably not continue for a long period of time.

"Q. Mr. Eastin, did you have any conferences with any individuals in connection with the reduction of the rail rate from Kentucky to the Widows Creek Plant of TVA?

"A. Yes; we are always after the railroads to reduce freight rates and I have discussed it with some of the L & N officials and our Sales Department has been very active on that. We are constantly trying to get the cost of transportation down and that is no unusual development in our picture.

"Q. Have you discussed the reduction of the rate with Peabody Coal Company? "A. No, we have never discussed it with Peabody Coal Company, frankly, because we wanted to take credit for getting the rate reduced with the buyer.

"Q. You have discussed it then with TVA? "A. 1183 I haven't. I expect our sales people have; I am sure they have talked to them about it because we are trying to sell them some coal at the time on a reduced rate.

"Q. Do you have bids in now to Widows Creek under the reduced rate? "A. We have bids in with Widows Creek. Of course the reduced rate would apply if it is established.

"Q. Have you discussed with anyone reduction of rail rate to Kingston Plant? "A. Yes, I think Kingston was included in the discussion.

"Q. Yes. "A. Those discussions, however, were primarily by our sales people and not by me.

"Q. Well, you have discussed it with your sales people? "A. Oh, yes.

"Q. Mr. Eastin, have you had any discussions with anyone" —

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Mr. Kramer: You have finished that other topic and, of course, we are continuing the objection with reference to the allocation of freight rates insisting that we had the right to deal with the TVA as we wanted to, or anybody else did.

Although this wasn't the United Mine Workers but
1184 it was the West Kentucky people. There is nothing illegal or wrongful in them attempting to obtain lower freight rates.

The Court: Not in and of itself there would not be anything wrong with that.

The Court: It may go into the record for whatever probative value, if any, it may have. But as indicated, their efforts to get lower freight rates in and of themselves have no significance, but such efforts, if connected up with any alleged conspiracy on the part of the union and one or more of the coal operators, and/or the trustees, can be considered by the jury for whatever bearing it may have on the ultimate issue in this case.

(The reading of the deposition continued.)

1185 "A. None whatsoever.

"Q. Mr. Eastin, do you have a later annual report?

"A. We have 1959. Do you have a copy of it?

"Q. No, sir. May we mark this Exhibit 3."

Mr. Rowntree: We would like to introduce that as the next exhibit.

Mr. Kramer: Of course, your Honor, the paper referred to this morning, we objected to. It is 1959 and subsequent to the period. We did not object to 1958. And it is not proper for any purpose in this lawsuit.

The Court: Well, the Court has ruled on that previously, members of the jury.

As you know, the material period, insofar as the subject of damages is concerned, is from February 14, 1954 until and including December 31, 1958. And if that exhibit, or the information therein, has any bearing on the issues that

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are involved in the case, it may be considered by the jury; but if the conditions as shown in the report and relate to a date subsequent to the period involved in the suit, are substantially different from the conditions that existed during the material period, then the jury will not consider such information.

1186 (Exhibit No. 71 was marked for identification and filed.)

Mr. Rowntree: I would like to read from page seven of that exhibit, your Honor.

This is the consolidated balance sheet, West Kentucky Coal Company and subsidiaries. Loss before taxes on income or income tax credit, that is before income tax credit, 1959, \$435,841.

Loss before cumulative unpaid dividends on preferred stock of subsidiary, \$410,841.

At page three:

"Production. Total production from your Company's properties and leases in 1959 amounted to 7,451,924 tons, an increase of 467,299 tons over 1958 production; while according to the Bureau of Mines, preliminary estimates of national production amounted to 410,000,000 tons, slightly under the 1958 production figure."

The Court: What is the purpose of that information?

Mr. Rowntree: If your Honor please, we allege a continuing conspiracy. This is not admitted on the purpose of damages. It is admitted or introduced on proving the conspiracy, the continuing conspiracy.

1187 The Court: Is it your contention that a part of that conspiracy was to tie up the coal lands of the coal companies so as to prevent the non-union people from purchasing, receiving any coal coming from those lands, so as to prevent the non-union people from selling any coal to union people? Is that the idea.

Mr. Rowntree: The purpose, your Honor, is to—we intend to prove in this case, your Honor, that this West Kentucky Coal Company and its subsidiary, Nashville Coal

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Company, with a huge union investment in it, was operated at a loss and was used as a fighting ship to dump coal at loss prices on the TVA market to depress the TVA market.

The Court: That is during the material period?

Mr. Rowntree: Yes, sir. And it continued on.

The Court: Well, it is competent. That testimony is competent, members of the jury, for that purpose, for whatever bearing it may have on that question.

1188 The Court: I understand.

I want to get this question cleared up, if I can, for all parties concerned, about these exhibits and this information that relates to 1959, when we know the material period ended December 31, 1958.

For clarity, will you state your position on that. I think I know, but I am not so sure that the jury is getting the purport of the ruling of the Court on that question.

Mr. Rowntree: Of course, we acknowledge that it can have nothing to do with damages, the amount of damages.

The Court: Yes.

Mr. Rowntree: But we think that later period is material with respect to proving a continuing conspiracy which
1189 started before the period and continued through the period of the damage and continued on after that period.

Now particularly under Section 2 of the Sherman Act dealing with monopoly. For instance, opposing counsel have requested a charge, the phrase "attempt to monopolize" means the employment of methods, means and practices which, if successful, accomplish monopolization and which, though falling short, nevertheless approaching so close as to create a dangerous probability of it, where means and methods are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.

In other words, they take the position, and I think it is substantiated in this American Tobacco Company case, that

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to prove an attempt to monopolize, you must show that the party charged approaches so close to actual monopoly as to create a dangerous probability of obtaining that monopoly.

Now when a party seeks to obtain a monopoly or attempts to obtain a monopoly by running other people out of business, the only way you can determine how dangerously probable the attainment of that ultimate purpose is, is to
1190 see what happens when he has run the people out of business.

Now our people went out of business December 31, 1958. To determine how dangerously probable this attempt to monopolize is, we have to see what happens when they have run a number of the small companies out of the market, and the only way you can possibly attain this purpose in proving your case is to see what happens when the other people have gone out of business.

1191 A continuing conspiracy, I think is acknowledged by all authorities, Your Honor, it can be proved by proof before the company goes out of business and proof after he has gone out of business, and certainly under this rule which counsel relies on, the attainment of dangerous probability of a monopoly, can only be proved by the period after our people have gone out of business.

The Court: Well, the Court, in its more recent rulings on this subject, has overruled the contentions of counsel, namely that the conspiracy which started in 1950 continued past 1958 and continues even to this day.

Now, the Court holds that this testimony, all of this testimony which relates to a period after December 31, 1958, is competent for whatever bearing it may have, if any, on the question of whether or not, first, there was a conspiracy, second, whether or not that conspiracy continues, and continues to date.

Mr. Kramer: Now, may it please the Court, it is our position that the fact that there was a larger proportion or smaller proportion of coal by one particular company after the period really involved in the conspiracy, that is the

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period of damage of this conspiracy, December 31, 1958, is incompetent to show that there was a conspiracy 1192 for the purpose of monopoly. Unless during the period involved in this litigation, there was — and I am talking about the period ending December 31, 1958 — unless there was such a combination unlawfully formed, that these people were damaged during that period time, there could be no recovery in this lawsuit.

The Court: That's right.

Mr. Rowntree: Absolutely correct.

Mr. Kramer: Therefore, Your Honor, what happened in 1959, we most earnestly insist, could not be material so far as this case is concerned.

The Court: That is where the Court respectfully differs. The Court is very sorry that it cannot agree with Mr. Kramer on all of these points, but that is a point that the Court cannot agree with you on.

Mr. Kramer: The Court does agree with the first point?

The Court: This has been ruled to be competent and the Court has directed the jury to consider it for whatever bearing it may have on the issues during this trial.

Mr. Kramer: I do not like to make a specific objection of this type, but I feel I should, Your Honor. When Your Honor directs the jury to consider—as I understand 1193 Your Honor has—for consideration of the jury if it throws light—they are not directed specifically—

The Court: No.

Mr. Kramer: Your Honor did just state that. I think Your Honor did not mean to.

The Court: No.

Mr. Kramer: Your Honor directs the jury to consider, you didn't mean that.

The Court: No, I mean that if it has any bearing on the issues, the jury could consider it. I meant to convey to the jury the idea that the Court has ruled this proof is competent for whatever bearing the jury may think it has on the issues

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involved, and that is the only purpose for which it is submitted.

Mr. Kramer: That is what was intended, Your Honor?

The Court: That's right.

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1194

"CROSS EXAMINATION

"By Mr. Russell Kramer:

"Q. Mr. Eastin, your testimony would seem to indicate that the capital stock of West Kentucky is listed on one of the stock exchanges, is that right? "A. That is correct; on the New York Stock Exchange.

"Q. Can you tell us how long West Kentucky stock has been so listed? "A. November 1, 1949.

"Q. And continuously since that time? "A. Yes.

"Q. Can you tell us approximately how many stockholders were shown on the books of the Corporation, stock books, as being stockholders in 1953, '54, '55, through that period, just approximately? "A. I can get them in five minutes for you definitely. We keep it right out here, but I would say there was about 36,000 to start with or a little more than 36,000, and it has gradually declined, and we now have about 6,000 or 7,000 stockholders; but if you would like to have those figures to put in the record, I can get them for you.

"Q. That is sufficient for my purpose. And I take it the size of those stockholdings among the different stockholders vary greatly from a small number to a large number? "A. That is right.

"Q. Has that been true during all this period of time? "A. That is true.

"Q. And, of course, a great deal of that stock is handled, or practically all of the sales are handled through the stock brokers? "A. That is correct.

"Q. It is not an unusual situation for stock to be listed on your books in the name of a stockbroker wherein the name of the actual owner is not shown? "A. That is correct.

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"Q. Could you give us the approximate date that West Kentucky Coal Company first went into operation? "A. Yes, I believe it was 1904; I have that right here. No, I don't, but it was around 1904; sometime in the year 1904; the year I was born, and that is the reason I remember it.

"Q. And it has operated continuously since about that time? "A. That is correct.

"Q. You made some reference to the fact that West Kentucky was the first coal company, I believe, that had a mine fully equipped with belt movement of coal. Would you explain just what you mean by that? "A. Well, in 1196 the trend toward mechanization, these trends had been in steps, but there had never been a mine up until we put in North Diamond, what we call North Diamond Number Two, in which the transportation of the coal was in its entirety hauled by belts, or transported by belts is a better word.

Your shuttle car moved the coal from a loading machine a distance not to exceed three or four hundred feet, and dumped it on a belt and then it went all the way out to the top of the tippie by belt; and that was the first mine of that type, all-belt mine.

"Q. Can you recall about the date of that installation? "A. Well, it was in 1940, the later part of 1940 we got finished.

"Q. From your early days of operation, West Kentucky has been mechanized to some extent, has it not? "A. Oh, yes; yes.

"Q. And as mechanization has improved in the mining field or mining industry, you people have tried to keep step with it, have you not? "A. Well, certainly. If you are going to stay competitive, you have got to.

"Q. And, of course, as you have already indicated that was taking place long before 1950? "A. Oh, yes, 1197 definitely.

"Q. How long have you been connected in one way or another with West Kentucky? "A. Well, I worked for

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them in the mines and on the coal tipple and with the Engineering Department in my high school vacation days, and then when I graduated from college I went to work for them in the fall of 1929, and have worked for them continuously since.

"Q. What field or department of this company were you with in 1929? "A. Well, I started as what we termed a billing clerk, which was really an invoicing clerk, making invoices on coal sales with a typewriter, and I proceeded from that job to the job on accounts receivable ledger, and then was moved to Louisville, Kentucky, and was made manager of the wholesale and retail branch of the company there, the original employment having been in Paducah where our sales office was.

And then I moved back to Paducah as assistant vice-president in charge of sales and sales manager and then I was moved over to Earlington, Kentucky, as assistant sales manager of the sample and art division, and then I was later made sales manager of the West Kentucky Coal Company and then made assistant to the president and then vice-president and then executive vice-president and then president.

1198 "Q. So that you are rather thoroughly familiar with this company and its growth and development over these years since '29? "A. I feel that I am, yes.

"Q. Can you tell us approximately without going into your records, the number of miners that West Kentucky has employed at the present time? "A. We have about 2500 people on our total payroll of which I would say about around three hundred are salaried people and the balance are hourly people working in the mines; that is taking both Nashville and West Kentucky; so that would be two thousand to twenty-two hundred, something like that. I can get those figures accurately.

"Q. That is near enough for my purpose. Going back over the years, have there been more men employed in the years gone by and if so, what about the maximum number

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and about when? Just approximation. "A. Well, before mechanization was generally adopted the coal was loaded by hand, and we had over five thousand men working in our mines.

"Q. Has that number gradually reduced as mechanization has gone forward? "A. That is true.

"Q. When were all of your mines mechanized, or your entire operation mechanized, about what year? "A. 1199 I would say that we were, and I can get this definitely if you want it, but I would say that our mechanization program had been pretty well completed by 1943 or '4; the transition has been completed by that time.

1200 "Q. Prior to that it had been gradual over a period of years? "A. That is right.

"Q. Of course, since that time mechanization has changed as new mining equipment has been developed? "A. That is correct.

"Q. Something has been said in your testimony this morning about leasing arrangements between Peabody and West Kentucky. Do you know how far back there have been leases on which Peabody has operated on certain properties owned by West Kentucky? "A. Well, early forties; and we, of course, have had leases with others and still do.

"Q. So that Peabody is not the only other coal producer to whom you have made leases? "A. Oh, no.

"Q. You do not, and when I say you I mean West Kentucky, does not do any strip mining do you? "A. No.

"Q. Do any of the companies to whom you have leased do deep mining? "A. Right now there is one small lease to a deep mine that is in existence where the small area was isolated and we couldn't mine it, and they were working along close to it and they are working that area. Otherwise, the coal would be left. Other than that, all of our 1201 present leases are on strip mine basis.

"Q. On the question of freight rates, of course, as a user, rather large user, of transportation facilities,

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West Kentucky has always been interested in getting the best rate you could? "A. Oh, certainly. We are always trying to get freight rates reduced. That is a part of selling. We are in competition continually with water borne coal, with gas, with oil in spots, and it behooves us to get the rates as low as possible and they are entirely too high because after all, sales are made on a delivered basis; and right now we are working with the railroads in an effort to get, in fact, have been assured that they will be reduced in other directions, and we will get credit for it with the buyer and, I hope, be awarded with a nice tonnage of coal.

"Q. That same practice and procedure has been followed by West Kentucky in dealing with the freight rate question for many, many years, has it not? "A. Yes, sir; I have heard about freight rates ever since I first came into this office and it has always been a bone of contention that we had certain disadvantages against us, which we were trying to overcome.

"Q. I take it that is not really novel though to West Kentucky. You have heard and have knowledge that
1202 practically everybody in the coal industry is making the same kind of a fight, have you not? "A. That is correct.

"Q. Yes, sir. "A. And even the Associations have generally resisted the freight increases and have tried to persuade the people who are transporting coal to reduce their rates.

"Q. Has there been a number of reductions of freight rates as a result of these efforts during recent years? "A. Of course, the general trend has been for rates upward and we have had a half a dozen or so freight increases in the last few years, too many and too much; but in specific cases where the railroads can develop some tonnage that they can move in volume they have been inclined to work with the producer and the buyer in reduced rates, and that is not abnormal, we have had a lot of those, a number of them.

"Q. Mr. Eastin if you do not feel you should answer this

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question I will not press it but if you feel it would not be giving an advantage to competitors that shouldn't be given to public, I wonder if you would give us your total tonnage sales over the past decade or so that West Kentucky has made? "A. Yes, sir. You are interested in tonnage?

1203 "Q. I am." "A. Well, 1948, 6,394,529; 1949, 6,056,139; 1950, 6,465,136; 1951, 5,513,890; 1952, 5,738,617; 1953, 5,080,565; 1954, 4,849,854; 1955, 6,356,620; 1956, 7,714,646; 1957, 7,724,909; 1958, 5,723,692; 1959, 5,932,869.

Now that is tonnage produced by us. That does not include some small tonnages purchased, well, for instance from West Virginia or from Eastern Kentucky or somewhere where we don't operate. That is produced tonnage.

"Q. Do those figures you have given for the recent years include tonnage produced by the Nashville Coal? "A. That is right, West Kentucky and Nashville.

"Q. When did you acquire Nashville properties? "A. October 1, 1955.

"Q. Prior to the signing of the first collective bargaining agreement by West Kentucky with the United Mine Workers of America, during the years previous thereto, did West Kentucky maintain a welfare and retirement fund? "A. They did.

"Q. Do you recall what amount of royalty you placed in or what amount per ton if you didn't call it royalty, you placed into that fund? "A. The same as the UMW of A welfare payment.

"Q. In other words, if that was .30¢ per ton you set that amount and if it was .40¢ you set that amount? "A. 1204 That is correct.

"Q. Now on the wage scale that you maintained for West Kentucky, can you tell us how that compared with the Union wage scale that was required by the collective bargaining agreements that the UMW had with other operators? "A. During the period that I have had knowledge of it, it has been comparable or in some instances slightly higher than the UMWA scale.

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"Q. I overlooked a moment ago when I was talking about transportation to ask you how long West Kentucky has used water transportation as a part of its delivery of the sales? "A. Well, when you go back to the early operations of the company we were in the water borne transportation business in a right substantial way, and then we started having the transportation done by others, and then after the Poplar Ridge property was divorced from us, which was our river end of the property, we had no river coal and we got out of the river transportation business and were out for a few years; and we felt the need of being back on the river for the effect that it has, frankly, on the railroad freight rates and serving certain customers to advantage, and that was one of the considerations in the acquisition of Nashville Coal Company, was that they had a river department and they had barges and boats and part of their property was adjacent to the river, and that is how
1205 we got back into the river business."

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REDIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Eastin, Mr. Kramer asked you a while ago about the stock of West Kentucky Coal Company, common stock, being traded on New York Stock Exchange. Could you give us the approximate price that stock is bringing on the Exchange at the present time? "A. I haven't looked this morning but it has been between 10 and 11 the last few days.

"Q. Do you know of any other large holder of the common stock of West Kentucky Coal Company besides those mentioned on the Proxy Statements which have been exhibited here? "A. Well, I think that would depend on what you mean by large.

"Q. Say anything over 25,000 shares. "A. Well, Mr. Colton has over 25,000; Barnum Colton.

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1206 "Q. He is the president of the National Bank of Washington? "A. That is correct.

"Q. Do you recall anybody else? "A. I can go in there and look in my drawer and tell you in a minute. Offhanded, I don't right now.

"Q. I would like to know. Would you confirm it if there are no others. "A. No, there are no other holders of 25,000 shares or more to my knowledge. We have some brokerage accounts that run in excess of those figures, but we don't know whether those are collective figures or for single individuals.

"Q. Mr. Eastin, approximately how many Joy machines do you have in your mines? "A. Well, we have, not including spares, eight at East Diamond, nine at Pleasant View, five or six at Uniontown. We also have some Goodmans at Uniontown. Three or four at Williams and five or six at Crescent and there would be eight at Fies. Now we have some spares that are not operating, that when you have a breakdown you slip them in, but that is approximately the number operating.

"Q. Do you know when you purchased the first one of the Joys? "A. Well, this is hearsay but one of the
1207 first Joys ever produced was tried out in our No. 8 mine at Sturgis, and I understand that the Company bought two of those back to, oh, 1923 or '4 or '5.

"Q. Is that the same type of machine? "A. Well, it has been improved.

"Q. Been improved? "A. Yes, sir.

"Q. Do you recall the numbers of these machines that you had in 1950, roughly, in comparison with the numbers you have today? "A. Well, it would be approximately the same except that we had more mines going of our own at that time and some of those mines worked out or were closed, and then when the Nashville mines were purchased then the numbers are approximately the same.

"Q. Do you recall how many employees you had, approximately, in 1950; miners? "A. I would want to check

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that record. If I were going to guess I would guess about 3000.

"Q. The coal industry has suffered inroads competition since 1948? "A. That is correct.

"Q. Many of the railroads bought coal for locomotion in 1948? "A. Yes.

1208 "Q. Did you sell to railroads? "A. Yes, we sold substantial tonnage to railroads.

"Q. Has the domestic market declined since 1948? "A. It has declined.

"Q. What is the principal consumption now of coal, is it in the utility field? "A. That is the brightest picture in our coal horizon is the utility field.

"Q. Has West Kentucky Coal Company sold coal to Peabody Coal Company? "A. Oh, yes, we have sold coal and bought coal from them and many other companies over the years.

"Q. Has Peabody Coal Company purchased more than any other coal-producing company? "A. From us?

"Q. From you. "A. No.

"Q. Who is the biggest purchaser among the producers?

"A. Well, you would have to give me a specified time and then I would have to look that up, but there have been times when we would sell substantial coal to others; and that changes with respect to the market; what the demand is. We had a large capacity of mines and when the market was good if we had more tonnage than we needed, why we
1209 sold it to others who didn't have the capacity we had.

"Q. Peabody has purchased from time to time substantial tonnage from West Kentucky Coal Company?

"A. That is right, yes. It all, again, depends on what you mean by substantial but we have sold Peabody a right substantial amount of coal way back; nothing lately.

"Q. You spoke of some disadvantages a while ago with respect to freight rates. Would the disadvantage you are speaking of be the disadvantage of distance from a particular market? "A. Well, I am not an expert on freight rates;

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we have got a man that is, and he has been working for this company longer than I have, but it is my opinion that distance does not always enter into the freight rate. It goes back, there is an old history in which there was certain basis established and those relations have prevailed to a substantial degree.

"Q. Now with respect to the Widows Creek market of the TVA, would the disadvantage there relate to the distance from the West Kentucky mines to the Widows Creek plant?

"A. Well, to deliver coal from Western Kentucky to Widows Creek on the old rates, to be competitive you would have to move it by water and bearing in mind that we have only one mine located on the river, it is to our advantage to get a rail rate in there which will permit us to move coal 1210 from these inland mines to Widows Creek.

"Q. Has Peabody Coal Company's tows moved West Kentucky or Nashville Coal Company coal on the Ohio? "A. I don't recall of any such movement. I don't recall any such movement.

"Q. Does anyone else move the West Kentucky or Nashville Coal Company coal on the water besides River and Gulf Transfer Co." "A. Well, at times you might have somebody passing that you had a barge you wanted moved, they would pick it up. Not substantially speaking, but there may have been some movement; I am sure there have been.

"Q. You have just told us that Nashville Coal Company, Inc. also has river towing equipment which also moves West Kentucky and Nashville Coal Company coal on the water?

"A. That is correct.

"Q. In addition to River and Gulf Transfer Co.? "A. That is correct.

"Q. Is the water towing equipment of Nashville Coal Company, Inc. directly owned by that company? It does not have a subsidiary? "A. No, it is part of Nashville Coal Company, Inc."

Mr. Rowntree: That is all.

1211- Mr. Robertson: May it please the Court and ladies

Deposition of Barnum L. Colton

and gentlemen of the jury, this is the deposition of Barnum L. Colton, taken October 31, 1960 in Washington, D. C.

• • • • •
 "BARNUM L. COLTON

was called as a witness,
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DIRECT EXAMINATION

By Mr. Rowntree:

"What is your name, please? "A. Barnum L. Colton.

"Q. Where do you reside? "A. 111 Oxford Street, Chevy Chase, Md.

"Q. I believe you are President of the National Bank of Washington? "A. That is correct.

"Q. How long have you held that position? "A. Well, I was elected, I think, in 1949. I think I resigned the latter part of 1953 or some part of 1954. I was out for several months as President of the Hamilton National Bank. Then I was re-elected President of the National Bank of Washington, the latter part of 1954 or first part of 1955. I have continued in that position ever since.

1212 "Q. Do you have the last statement of the National Bank of Washington? "A. The statement of condition, October 3, 1960, subject to the call of the Comptroller of the Currency."

Mr. Robertson: Here we marked that as Exhibit 1 to the deposition. We wish to introduce this statement as Exhibit 72 in this record.

Mr. Kramer: The date again involved is down in October 1960, back of the period, and for the reasons given we object.

The Court: Same ruling.

(Exhibit No. 72 was marked for identification and filed.)

Mr. Robertson: We point out from this statement on the back; where it lists the board of directors, there is listed the names of Welly K. Hopkins, general counsel of the

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United Mine Workers of America, and A. D. Lewis, executive, United Mine Workers of America, both of whom are on the board of directors.

We might point out, I suppose you might call that the third page, where the advisory board is listed, on that board is Thomas F. Ryan, Jr., comptroller, United Mine Workers of America, Welfare and Retirement Fund.

* * * * *

1213 Mr. Robertson: Just one other item, Mr. Combs.

On the condensed statement of condition, the loans of the bank are listed there in the amount of \$114,488,711.94.

That is all I wish to bring out on that statement.

Mr. Combs: May I point out at this time, your Honor and ladies and gentlemen of the jury, the National Bank of Washington shows on this report that it made, it is a member of the Federal Reserve System and it is a member of the Federal Deposit Insurance Corporation. It was chartered by an act of Congress.

The board of directors, from which Mr. Robertson
1214 read, contains in addition to Mr. Hopkins and Mr.

Lewis, some 24 members of the board of directors, including Mr. Hopkins and Mr. A. D. Lewis. The advisory board to which counsel makes reference, contains 27 members of the advisory board, including Mr. Thomas F. Ryan, Jr., with the trustees of the Welfare Fund.

(The reading of the deposition continued.)

"Q. About October, 1957, did the National Bank of Washington acquire the Liberty National Bank of Washington?

"A. That is correct.

"Q. It was made a branch of the National Bank of Washington? "A. Yes.

"Q. How many branches does the National Bank of Washington have? "A. We have one main office and 11 branches.

* * * * *

"Q. Are they all located in the District of Columbia? "A. Yes.

Deposition of Barnum L. Colton

1215 "Q. Is the National Bank of Washington the second largest bank in the City of Washington? "A. The third.

"Q. We asked you to bring in papers concerning the loan transaction to you from the United Mine Workers of America, in the amount of \$12,428,241.99? "A. I don't have any papers in connection with that transaction. I would be very glad to answer any questions or give you any information that you like in connection with it.

"Q. All right, sir. How many shares of stock does National Bank of Washington have outstanding now? "A. 725,000.

"Q. That would appear on this Exhibit 1?"

Mr. Robertson: That is now Exhibit 72.

(The reading of the deposition continued.)

"A. Yes, sir.

"Q. Do you know when the United Mine Workers of America acquired the 287,884 shares that they had at the end of 1958? "A. Well, I think that first acquisition was in 1949. I think that they have been buying the stock from time to time when it was offered for sale by brokers.

"Q. Since 1949? "A. Yes, sir.

1216 "Q. Do you recall how substantial a block of stock they had in March of 1954, was it large or not? "A. Just speaking from memory, I would say they controlled 75 to 80 per cent of the then outstanding stock of the old National Bank of Washington prior to the acquisition—I think they owned 75 to 80 per cent of the stock prior to its consolidation with the Hamilton National Bank.

"Q. The Union has exhibited a note, dated March 15, 1954, in the principal amount of --" I believe that should be \$1,320,750 — "\$1,320,750, signed by you, which I show you? "A. Yes, sir.

"Q. Do you recognize that as the note which you signed?"

"Q. I would like to get a statement from you, Mr. Colton, as to how this transaction came about. What was your first

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knowledge of it? "A. The Hamilton National Bank was a very active organization. They had several branch locations in Washington. The old Bank of Washington had one, down at 7th and Pennsylvania, in an area that was, in our opinion, not getting any better. They had another branch down in the Southwest, which the Government would take in its re-development program.

1217 "I felt that, insofar as I was concerned personally, the Bank would have a very hard time to progress and get anywhere unless we were in position to consolidate with some other bank and expand our operations throughout the city.

"So in our talks with Mr. James N. Johnston of Johnston Lemon & Company, he felt, he was of the opinion, if I tried to negotiate on the acquisition of the Hamilton Bank that it might be that we would be successful in acquiring sufficient stock in that bank to be able maybe to have a consolidation."

Mr. Robertson: I point out that the exhibit referred to before the last question as filed as Exhibit 1-C to the deposition and that is now Exhibit 51 in this record.

(The reading of the deposition continued.)

"Q. At that time you were President— "A. Of the National Bank of Washington.

"Q. So this was at the time after you had resigned, then come back to the National Bank of Washington? "A. No, I think this must have been before I left the National Bank of Washington, because I didn't resign from the National Bank of Washington until I had acquired the controlling interest in the Hamilton National Bank. Then they elected me President.

1218 "Q. So what did you do, then, after having these discussions with Johnston Lemon? "A. I went to the Mine Workers and told them I felt I had an opportunity to, perhaps, if I were successful personally, in being able to pick up enough stock, with the friends we had in the Hamilton National Bank, we might be able to work out a consoli-

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dation, would they loan me the money to go forward with the deal. They said they would.

"Q. You went to the United Mine Workers of America because they were the controlling stockholders? "A. That is correct.

"Q. Of the National Bank of Washington, is that right?

"A. That is correct. I thought ethically I would have to go to them first.

"Q. Who did you discuss that with? "A. If I recall, I discussed it with Mr. Kennedy and Mr. A. D. Lewis.

"Q. Did they agree? "A. Yes, sir.

"Q. Was the amount involved discussed? "A. The amount involved was discussed, not in specific figures. They agreed that they would loan me money from time to time as I reported to them of acquisitions through Johnston Lemon. I agreed to give them a note from time to time as I needed the money and acquired the stock, on advances.

"Q. This note which I have referred to above, the note of March 15, 1954, represents advances made up to that time? "A. There might have been other notes than this, but when we ended up, we had two notes, if I recall, covering the acquisition by me of the controlling interest in Hamilton National Bank. I think one note was a million, three hundred-some thousand dollars. Another note was ended up with a balance due, I think, eight million, three hundred-some thousand dollars.

"Q. At the time of this first note, the \$1,300,000 note which is in front of you, was that the first note, to the best of your recollection? "A. It could have been. Let me bring the next step down. The next step down, to bring up and develop this item of \$12,428,000. After the consolidation had been effected between the Hamilton Bank and the National Bank of Washington, they agreed to increase that stock, give them additional capital fund. They gave the stockholders the right to subscribe to new stock on the basis of one share for every two shares held.

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"I borrowed an additional two million, seven hundred-some thousand dollars, which I think makes up three notes that they have of mine, totaling \$12,428,000."

1220 Mr. Robertson: Your Honor, I point out at this time that these three notes which he refers to here in this testimony all have provisions similar to those provisions as the notes we took up this morning.

I would like to read one provision from one of these notes which is common to all of these, beginning next to the last paragraph:

"It is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation"—that is Mr. Colton—"in the event demand be made for payment by the maker and default occurring the recourse to be holder thereof"—United Mine Workers officers—"shall be the collateral pledged hereunder and should there be a deficiency on said note after sale of said collateral, no liability shall attach to the maker of this obligation for claims or charges of any kind of character. In the event of the death of the undersigned, the holder of this obligation reserves the right to take over the collateral immediately and transfer it to their own name or its nominee. In such event no further liability shall exist on this obligation to the maker, his heirs, executors or administrators."

1221 The Court: Now that note is signed by Mr. Colton?

Mr. Robertson: Yes, sir.

The Court: And what was attached to the note as collateral?

Mr. Robertson: The original note, Your Honor, the collateral attached was shares in the Hamilton National Bank in Washington. Then later, after the Hamilton National Bank was merged with the National Bank of Washington, then shares in the National Bank of Washington were substituted as collateral in the place of the old Hamilton National which had gone out of existence.

The Court: Did Colton borrow that money from the UMW?

Deposition of Barnum L. Colton

Mr. Robertson: Yes.

The Court: Over two million dollars?

Mr. Robertson: Advanced by the union and which Mr. Colton said was advanced for the purpose of purchasing Hamilton Bank shares of stock.

The Court: That note is payable to the order of the United Mine Workers?

Mr. Robertson: This is a demand note. Mr. Colton states—the note itself is not made to the UMW—but Mr. Colton states that the note was given to the UMW.

1222 The Court: Well, to whom is it made?

Mr. Robertson: Just to the holder of this note.

The Court: Demand note.

Mr. Robertson: Just a demand note.

The Court: All right, now what do those other notes carry, how much are they?

Mr. Robertson: Well, the first note which we have already spoken of, \$1,320,750. Then —

The Court: Who signed that? Mr. Colton?

Mr. Robertson: That's right.

The Court: For the same purpose, to buy stock in the Hamilton National Bank, and the money was borrowed from the UMW?

Mr. Robertson: Yes, Your Honor.

The Court: All right.

Mr. Robertson: The second note which is shares of stock in the Hamilton National Bank were pledged as security, purchased with the money and pledged as security, and also signed by Mr. Colton, was in the amount of \$9,170,487;

And the third note which is pledged for shares — I mean the shares of the National Bank of Washington are pledged as security, was in the amount \$2,754,105;

1223 And on the first two notes, after the Hamilton National Bank was merged with the National Bank of Washington, then National Bank of Washington shares were substituted as collateral in place of the old Hamilton National Bank shares.

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The Court: Well, were those notes paid off by the bank or what was the ultimate result?

Mr. Robertson: It's just been left like this ever since that time, so far as we know.

The Court: Still outstanding?

Mr. Robertson: There's no repayment on the debt, and the stock is still pledged with the union, they are holding the stock.

Mr. Kramer: In the record that was filed the other day in one of the exhibits, Your Honor, there was a showing that as of July 31, 1958, the date we were asked about, these notes were outstanding, and this stock was still collateral.

I say "this stock", I mean the National Bank of Washington, because as counsel has well stated, the Hamilton National Bank passed out of the picture, but shares of the stock in the National Bank of Washington, and I think the date was July 31st, 1958, and the report shows that 1124 these were notes owing by Mr. Colton, and they were pledged as collateral for the notes.

The Court: Does he owe that much money personally?

Mr. Kramer: He borrowed the money personally, and it was his loan to buy the stock in his name.

The Court: And he borrowed over twelve million dollars?

Mr. Kramer: He borrowed the money from the United Mine Workers of America, and Mr. Lewis testified to that, which we say, Your Honor, has nothing—it is true that he put up stock which we say was ample security for the loan. United Mine Workers of America made the loan, and he put the stock up as collateral. It has nothing to do with conspiracy.

Mr. Robertson: Your Honor, again reading from the note, it states on its face:

"It is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation in the event demand be made for payment by the maker and default occurring, the recourse to the holder thereof shall be the collateral pledged hereunder, and should there be a

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1225 deficiency on said note after sale of said collateral, no liability shall attach to the maker of this obligation for claims or charges of any kind or character.

"In the event of the death of the undersigned, the holder of this obligation reserves the right to take over the collateral immediately and transfer it to their own name or its nominee. In such event, no further liability shall exist on this obligation to the maker, his heirs, executors, or administrators."

Mr. Kramer: That is true, it is limited security only, but it was a straight loan under those terms. They put these collateral up, and it could be paid off by surrendering the collateral, death or in the event of his death, it could be taken in in the conditions, but Your Honor, we say that was not a conspiracy, but was a matter of judgment in making the loan to Mr. Colton who was the president of that bank. He was not the president of the — he was part of the time — the National Bank of Washington. He was with the Hamilton National Bank, and they acquired the Hamilton, and then merged it with the Hamilton Bank of Washington.

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1226 Mr. Combs: Without waiving our objections to the admissibility of it, I want to reiterate what I said a while ago, what I said to that exculpatory clause, he is talking about that the note recites that the collateral and the promise of the maker of the note, that the Mine Workers were securing the loan for.

Now it is true, Your Honor, as counsel has said, that the Mine Workers loaned money to Colton to get the stock, it is testified by Colton, there is no question about that in this record.

Now, insofar as the beneficial ownership of this stock is concerned, I want to point out that in the merger of these two banks, the evidence will show that the ownership was gone into about this stock, and the merger was approved by the Federal Reserve System. They had to approve it before they could merge, and after they merged, they

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1227 reissued Hamilton stock instead of the Bank of Washington.

Mr. Robertson: We don't contend this is an illegal transaction. We are just saying it is a most peculiar transaction for anybody who wants to acquire shares of stock to acquire it in this fashion through some person who gives a note for it.

The Court: Mr. Rowntree, tell me, according to your contention, what part, if any, do these transactions play in the entire picture of this case?

Mr. Rowntree: We say, Your Honor, that a part of this conspiracy was the exercise of economic power by the union, not only with respect to the National Bituminous Coal Wage Agreement, but also with respect to finances.

We have gone into some detail with respect to the use of the Union's own money in this field, but we say that there is additional economic power in this Union. Now we must acknowledge that we have been unsuccessful in developing the extent of the use of this additional economic power, because questions were not answered.

However, it is our contention that that economic power exists through this addition arm which is made up by this National Bank of Washington, and that that power
1228 does exist. Now, we can't develop the actual use of that power, but the existence of the power is what we are contending for here.

We can't follow through because of practical difficulties affecting a small litigant in the pursuing the ultimate results of an investigation, but we say the power exists, and his part of the conspiracy. The potential of fulfilling this conspiracy that we allege, the economic force that potentially could be used, did exist. That is our purpose, Your Honor.

The Court: All right.

Mr. Combs: May I make this remark in connection with that, Your Honor?

The amounts that are involved here, of course, are large amounts, but I think that we should remember that we are

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talking about the assets of over five hundred thousand people that have been accumulated since 1890.

Now the basis of our objection is just simply this: I don't think there is anyone who will argue just because it is a union, they don't have a right to make investments in order to try to increase whatever earnings they have and to lessen the necessity of their members paying dues.

Of course it is economic power if you want to characterize it that way, but relatively speaking, I don't think we have something here just because of the transaction itself, no illegality or immorality or anything involved in that, unless this is tied in with a conspiracy to violate the anti-trust laws.

It is our contention that this has nothing to do with this lawsuit.

The Court: All right.

(The reading of the deposition was continued.)

"Q. I show you the next note, under Exhibit 1-C,—"

Mr. Robertson: Which we have just referred to.

(The reading of the deposition was continued.)

"—that the Union has filed to the interrogatory, Set No. 2"

"dated April 26, 1954, in the amount of \$9,170,487. Is that the second note? "A. Yes, sir.

"Q. A third note under that exhibit to those interrogatories is the note dated September 15, 1955, for \$2,754,105. Is that the third note? "A. Yes, sir.

1230 "Q. The reason there were two notes, these first two notes, is because the Union had advanced so much money up to the date of that first note, and those first transactions were represented in that first note, is that right? "A. Well, if I recall, the first transaction of Johnston Lemon had to commit themselves to options in our behalf to acquire this original block of stock. I think the obligation at that time amounted to around \$1,300.00, whatever it was.

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"Q. That is the initial block of stock in Hamilton National Bank? "A. That is right.

"Q. You had to have funds to obtain those options at the outset? "A. I had to have funds to buy the stock, take up the options.

"Q. Take up the options? "A. Yes, sir.

"Q. This stock was registered in the name of Johnston Lemon and Company, when it was acquired? "A. Some of it was put in my name. Some of it, I left in his name.

"Q. Johnston Lemon? "A. Yes, sir.

"Q. Is that stock still in the name of Johnston Lemon and Company? "A. Some of it, yes. Some of it is in
1231 my name.

"Q. Johnston Lemon and Company is the agency that solicited the stock, or did you do some yourself? "A. I did some myself.

"Q. The loans that were made by the Union were deposited in the National Bank of Washington? "A. Not to my knowledge. I don't know what they did with them.

"Q. You didn't get the loans yourself? "A. How do you mean?

"Q. The money advanced by the Union? "A. They gave me the money. I put the money to my credit. If Johnston Lemon needed money, I funneled them money as they acquired the stock.

"Q. You put it to your credit in the National Bank of Washington? "A. That is correct.

"Q. You would issue checks for the stock as it was purchased? "A. When Johnston Lemon would tell me they needed money to pick up additional shares, I would give them the money, yes, sir.

"Q. This Exhibit 1-C, the first note, provides for the payment of dividends to the holder of the note. I believe that is contained in the third from the last paragraph there.

Who was the holder of the note? "A. United Mine
1232 Workers.

"Q. Did the holder get the dividends that were

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issued on that stock? "A. Yes, sir. As the dividends were paid, they were placed to the credit of my account. I received them.

1233 "Q. You received them from the Hamilton National Bank? "A. And the National Bank of Washington.

"Q. And the National Bank of Washington. "A. Subsequent to acquiring it.

"Q. Then you remitted them to the holder of the note, which was the Union?"

Mr. Kramer: There is some confusion there, I believe.

"Q. The note, Exhibit 1-C, recites, in the next to the last paragraph, that it is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation in event demand be made for payment by the maker.

"Do you know what that means?"

"A. It means just what it says.

"Q. 'Payment by the maker.' By the maker does not refer to demand, that refers to payment by the maker? "A. Yes, I think the note speaks for itself. It says: 'It is distinctly understood and agreed that no personal liability shall attach to the maker of this obligation, in event demand be made for payment by the maker, and default occurring.' Recourse is only to the collateral.

"Q. It goes on to provide: 'And should there be a deficiency on said note after sale of said collateral, no
1234 liability shall attach to the maker of this obligation for claims or charges of any kind or character.'

"So the maximum of your liability would be the surrender of the collateral, which was the shares of stock purchases for these loans? "A. That is right.

"Q. If the stock went up in value, you would obtain the benefit of the gain? "A. If the stock was sold, and I still held it, I would pay off the note and realize the profit.

"Q. But the Union did risk that the stock might go down in value? "A. That is correct.

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"Q. If it went down in value, the Union would suffer the loss? "A. If they sold it at a loss.

"Q. Wasn't there an understanding that the Union would actually be the owner of this stock? "A. No, sir.

"Q. In other words, the Union officers were submitting the Union funds to risk, without the hope of capital gain?

"A. I wouldn't think so.

"Q. Isn't that it? "A. We have got the finest bank in the city. I think we are going to make a lot of money.
1235 I think the future of this bank is beyond question.

"Q. We have been hearing a lot lately about the economic condition of the country. Some people say one thing, some another. It is a rather uncertain thing, isn't it? "A. Not with this bank stock, in my opinion.

"Q. Of course, that is an opinion that the President of the bank should have, right? "A. Right. I hope we always have it.

"Q. The note provides that if the holder makes demand upon you for payment of the note, that if the demand is not met, the Union can take the stock? "A. Yes, sir.

"Q. A similar provision occurs in the second note? "A. That is correct.

"Q. The \$9,000,000 note? "A. That is correct.

"Q. Would it be possible for any man anywhere near in the vicinity of your economic status to pay roughly twelve million dollars on demand? "A. I think I could refinance that note, yes, sir.

"Q. By what means? "A. As the stock stands, I think, around \$40, selling around \$60, I think I could re-
1236 finance that note. I think I could sell that stock at a profit.

"Q. You could do it today? "A. Not today or maybe to-morrow, but I think with the type of bank that we have, I am sure we could get somebody who would underwrite a very substantial block of that stock.

"Q. But if the economic situation were not as good as it is at the present day, and it is exceptionally good, isn't it?

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"A. As far as our bank is concerned, we are making money. We had a fine year. We have no problems.

"Q. But if it had been different, it would have been pretty rough to raise \$12,000,000. "A. That is right.

"Q. If you should die today, which we hope won't happen, Mr. Colton, the Union could take this stock? "A. They could take it and my estate maybe would have an estate tax problem that would be very substantial.

"Q. Your estate tax problem? "A. Yes, sir.

"Q. On the face of the note, however, the Union could take the stock? "A. That is correct.

"Q. Both under the first note and the second note, and also the third notes? "A. That is correct?

1237 "Q. That is right? "A. Yes.

"Q. Regardless of the fact that it has gone up in value? "A. That is correct. If I couldn't pay when they demand:

"Q. Regardless of demand, they could take it upon your death? "A. That is correct.

"Q. The Union would not have to pay your death taxes under the terms of that note there? "A. I might not have enough estate to pay the taxes. They might have to, I don't know.

"Q. Have you discussed that with the Union? "A. No, sir.

"Q. The first note has a note in handwriting at the bottom, referring to \$13,831 on above received 4-2-54, credited on the balance. What was that transaction? "A. It just must have been excess funds I had in connection with the borrowing at the time I intended to apply on the front of the note.

"Q. There was no specific amount of stock you could buy at the time in connection with the \$13,000? "A. I
1238 don't know just what the funds were. They were excess funds, I returned them.

"Q. The note recites, the first note recites, in the last notation on it: On October 13, 1954, by mutual agreement

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and the consent of the holder, the Hamilton National Bank stock which was the collateral, I am paraphrasing, was taken down, and there was substituted shares of stock of the National Bank of Washington. I believe the second note has the same notation at the end. "A. That substitution was made by reason of the fact that the Hamilton National Bank went out of existence. The National Bank of Washington was the successor bank.

"Q. Do you recall what percentage of the outstanding shares you held in your name and in the name of Johnston Lemon & Company at the time of that transaction? "A. Percentage-wise I can't tell you. I can tell you the last several years, as a result of these transactions, there are pledged for these three loans, 275,410 shares, I think, I have 635 shares unpledged. So the total is 276,045, against 725,000, what would that be?

"Q. The computation can be made later.

"At the time of that transaction, where the banks were consolidated, what percentage of the Hamilton National Bank stock were you holding? "A. I think we picked up around 80 per cent.

1239 "Q. Eighty percent? "A. Maybe a little more.

"Q. So at the time the Union commenced making to you loans to buy Hamilton stock, they held approximately 80 per cent of the National Bank of Washington stock? "A. Yes.

"Q. And at the time that you completed the consolidation of the banks, immediately prior thereto, you held as result of these loans and the \$2,000,000 that you borrowed—

"A. To cover the increase in stock.

"Q. To cover the increase in stock, approximately 80 per cent of the stock of Hamilton National Bank. "A. At the time I went in as president and acquired the stock through purchases, covering maybe the first two acquisitions, I acquired around 80 per cent of the Hamilton National Bank stock.

"Q. Mr. Colton, has any principal amount been paid on

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these loans represented by these notes we are talking about?

"A. Only the return of the excess funds which I borrowed which were applied on the account. I think the endorsement shows that. It has been paid in the way of dividends.

"Q. The excess fund, the fund not applied? "A. I think the endorsement, one was an eight hundred some 1240 thousand dollar credit. I think the item which you mentioned of \$13,000 was another. There were a couple of minor adjustments on the notes.

"Q. By excess funds, you mean funds not needed to buy stock? "A. That is correct.

"Q. Has the Union made any demand upon you for payment? "A. No, sir.

"Q. Has the United Mine Workers of America maintained considerable funds on deposit with the National Bank of Washington? "A. Well, now we are getting into an area which I would like to discuss with counsel. I feel that bank balances and transactions by the Bank of Washington are in the nature of privileged transactions. I would rather not discuss them, unless you feel that I should discuss them."

Mr. Robertson: And there, Mr. Wilson, counsel for Mr. Colton, stated, "Mr. Colton, I think counsel for the Union and the Welfare Fund are agreeable to your" —

Mr. Kramer: No objection. We do not object at all, and we told the bank if they wanted to disclose it to disclose it, and they do so, your Honor, on the next page.

1241 (The reading of the deposition was continued.)

"The Witness: I have a memorandum showing the balances in these accounts as of October 27, 1960.

"The Witness: It might not be the close of business, but it was the balance we obtained from the bookkeeping department as of that day. I have five in this memorandum.

"1. United Mine Workers of America, Welfare and Retirement Fund, \$10,300,259.00.

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"2. Welfare and Retirement Fund, 'Pension Account', \$8,311,157.88.

"3. Welfare and Retirement, 'Administrative Account', \$712,984.37.

"4. United Mine Workers of America, this is the Union, International Union, \$13,175,687.15.

"5. United Mine Workers of America, International Union, Savings Account, \$4,903,549.40."

Mr. Combs: May it please the Court, that closes the phase of the bank notes that he is inquiring about. I would like to observe that each of the notes that they are talking about, that any and all dividends declared and paid on the stock, was to be paid to the union as interest, and that these amounts he has testified were paid to the union are 1242 dividends received on the notes, and that shows on the notes, and I think that is a clarification they should know about.

Mr. Robertson: I think so too.

Mr. Robertson: Your Honor, we have completed the examination of Mr. Colton in this deposition as to the interest of the United Mine Workers in the National Bank of Washington.

We have prepared a chart for the benefit of the jury to point out the interest of the Union as was testified to by Mr. Colton. I will now ask that it be put on the board.

1243 Mr. Robertson: I ask that it be marked as an exhibit.

Mr. Combs: Of course, your Honor recognizes that we are not waiving our objection to the entry of the testimony.

The Court: Yes, sir.

(Exhibit No. 73 was marked for identification and filed.)

1244 "Q. We have received from the United Mine Workers of America an exhibit, marked 1-D to interrogatory, Set No. 2, a note dated December 30, 1959, for \$750,000 principal amount, a note dated October 28, 1955,

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in the principal amount of \$631,875. Those two notes were assigned by you to the Union, is that correct? "A. Yes, there were three notes signed by me, representing a balance of \$2,256,875, secured by 75,000 shares of West Kentucky Coal Company stock."

Mr. Robertson: Here Mr. Kramer points out:

"Mr. Kramer: Copies of all three of these notes do appear as Exhibit 1-D, with the answer to interrogatory, Set No. 2. You have just overlooked one of them. The third is in this file.

By Mr. Rowntree:

"Q. The third is dated March 1, 1956, for the principal sum of \$875,000. Is that right? "A. Yes, sir."

Mr. Robertson: These three notes, all of which are secured by collateral shares of stock of West Kentucky Coal Company, are already in this record as Exhibit No. 52.

We would merely point out at this time that these three notes are like the other three notes, the one secured by the bank shares of stock, in that no personal liability attaches to Mr. Colton and that he can surrender the shares of West Kentucky Company for full satisfaction of debt. Also that the union can take over the collateral in the event of his death.

Mr. Combs: I would also like to add to that, your Honor, that these are demand notes, payable on demand, with the promise to pay, with this collateral hypothecated to the United Mine Workers.

(The reading of the deposition continued.)

"Q. Mr. Colton, will you tell us what happened in those series of transactions?

"A. If I recall, I was in conference from time to time with Mr. John L. Lewis, and we had discussions of coal and coal operations. We were discussing, if I recall, the West Kentucky Coal Company. I don't know whether he suggested it or I suggested it, that I buy some West Kentucky Coal Company stock.

"He made arrangements for me to acquire, in the first

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instance, in 1955, 25,000 shares through Laidlaw & Company, local brokers. The second transaction in 1956—

“Q. That would be the \$631,875 note? “A. Yes.

“Q. That is the note which was signed after you talked to Mr. Lewis about the West Kentucky Coal Company 1246 stock? “A. Yes.

“Q. Did Mr. Lewis indicate to you the status of the corporation at that time with respect to the purchase of Nashville Coal Company? “A. No, sir.

“Q. He didn't mention Nashville Coal Company? “A. No, sir.

“Q. Were you advised at that time the company was buying or had bought Nashville Coal Company? “A. No, sir.

“Q. Did you know anything about the West Kentucky Coal Company? “A. We got a lot of information in our services, Standard, Poor's, and I checked it pretty carefully.

“Q. You hadn't heard anything at all about Nashville Coal Company? “A. There might have been something in the reports about Nashville Coal Company. As far as I recall, I don't remember definitely, I don't know definitely.

“Q. You didn't pay any attention about Nashville Coal Company, it didn't mean anything to you? “A. It might have been a company that had enormous reserves of coal.

I don't recall just exactly how it was mentioned.

1247 “Q. You weren't informed as to the size of Nashville Coal Company? “A. No, sir.

“Q. Now what about this next attraction; how did that come about, the March 1, 1956? “A. Just about the same way.

“Q. Mr. Lewis came to you again? “A. No, we were discussing it. I don't know just how the discussions came about. But I acquired another 25,000 shares.

“Q. In each of those instances the Union loaned you the money to acquire those shares? “A. They must have paid Laidlaw, because the stock came from Laidlaw. I actually received the stock from Laidlaw, transferred in my name,

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and I delivered those shares to the United Mine Workers as collateral for the two loans.

"Q. Laidlaw actually acquired the shares? "A. Yes, sir.

"Q. Do you know if they bought them on the exchange?

"A. I don't know.

"Q. Do you know if they were new stock? "A. I don't know. I haven't any idea.

"Q. These two notes we have referred to, being part of Exhibit 1-D" —or Exhibit 52 in this record —"dated 1248 respectively October 28, 1955, and March 1, 1956, are provisions similar to those connected with the National Bank of Washington stock, in other words, the holder of the note is to receive the dividends that are paid on the shares put up as collateral? "A. Yes.

"Q. And it was agreed that you would have no personal liability if the Union took the collateral down as it had a right to do under those two notes? "A. That is correct.

"Q. In other words, if the stock increased in value, you would get the gain? "A. That is correct.

"Q. If the stock went down in value, the Union would suffer the loss? "A. If they sold it.

"Q. Well, the Union would suffer the loss if demand were made and default occurred on these obligations? "A. They would take over the collateral.

"Q. Right. "A. If they sold the collateral, whatever they sold the collateral for would determine whether they made a profit or loss.

"Q. Are you familiar with the price of this stock, the value of this stock on the New York Stock Exchange? 1249 "A. I think it is around \$10, \$11, or \$12 now.

"Q. Are you familiar with how much was paid for this stock at the time you bought it? "A. \$35, \$30, and \$25, as I recall it.

"Q. The stock has gone down quite a bit? "A. Yes.

"Q. So the Union stands to suffer the loss on this stock unless it goes up in value? "A. That is correct.

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"Q. If you should die, again we hope it won't happen; the Union would take the stock? "A. That is correct.

"Q. Have you attended any stockholders' meetings of the West Kentucky Coal Company? "A. No, sir.

"Q. Have any amounts been paid on the principal of these obligations? "A. No, sir, just the dividends when they were paid.

"Q. Has the Union made any demand for payment? "A. No, sir.

"Q. None of these notes that we have been talking about, both with respect to the National Bank of Washington stock and the West Kentucky Coal Company stock provide for the payment of any interest except these dividends 1250 that were paid over? "A. That is correct."

By Mr. Rowntree:

"Q. Mr. Colton, I show you Exhibit 1-B, filed by the Union in answer to interrogatory, Set No. 2, a letter signed by the officers of United Mine Workers of America, as officers and trustees, to the National Bank of Washington, the date is not visible, does anyone have a date on that exhibit?"

"Q. It looks like 12-16-57. Do you recognize that letter?"

Mr. Robertson: And I point out here that that is Exhibit 50 in this record. And here, upon advice of counsel, Mr. Colton did not answer.

Mr. Kramer: That was advice of his personal counsel, of his bank, and not of us, your Honor.

Mr. Robertson: This letter, Exhibit 50, is addressed to the National Bank of Washington. It is from the officers of the United Mine Workers of America and is addressed to the attention of Mr. Barnum L. Colton. It states, and I quote—

1251 Mr. Robertson: It states:

"In consideration of your granting a line of credit to the West Kentucky Coal Company, Inc., a corporation

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organized under the laws of the State of New Jersey, in the amount of \$5,200,000, at our request, authority is hereby given for you to hold \$5,200,000 face value United States of America Bonds owned by us as collateral for the repayment of said indebtedness.

"Said indebtedness of the West Kentucky Coal Company, Inc., is to be evidenced by their promissory note or notes and discounted by you under such taxes and conditions as you may direct.

"It being expressly understood and agreed that in case of default of said promissory note or notes all or any part of said bonds may be sold by you without further notice or authority from us to repay said indebtedness including interest due thereon.

"Upon payment in full of the obligations of the West Kentucky Coal Company, Inc., you are to return to us the above mentioned bonds."

Signed by the officers of the United Mine Workers of America.

(The reading of the deposition continued.)

"Q. Mr. Colton, our subpoena asks for you to bring in papers relating to loans made by the National Bank of Washington to businesses engaged in the coal mining business, and specifically to coal producing companies in the year 1954 through 1960, or showing loans made for the purpose of investments by anyone in coal producing companies or coal properties.

"Do you have any records with you to conform with that subpoena?"

Mr. Robertson: Here, your Honor, Mr. Wilson, the witness' counsel, states as follows: "There are several—"

Mr. Kramer: Just a moment. Your Honor, we don't think statements made by attorney for the individual himself, not made for the United Mine Workers or trustees of the Welfare and Retirement Fund, are admissible at all. In other words, it is a third—

Deposition of James W. Haley

1253 Mr. Robertson: I will simply state here upon the advice of counsel Mr. Colton did not let us see his papers.

Mr. Kramer: For that, your Honor, we cannot be charged in any way.

(The reading of the deposition continued.)

1255 "Q. Did you discuss anything in connection with the case? "A. Yes, when all the publicity came out in the newspapers, I communicated with Mr. Whiteford. We went over to the Mine Workers and discussed the situation.

"Q. Did the representative of United Mine Workers suggest that objection be made to disclosure of transaction of the bank with coal companies? "A. No, sir.

The deposition of James W. Haley, this deposition was taken on October 31st, 1960, in Washington, D. C.

"JAMES W. HALEY

"was called as a witness.

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. James W. Haley.

"Q. Where do you live? "A. 4365 North Twenty-sixth Street, Arlington, Virginia.

"Q. You are an officer of Jewel Ridge Coal Corporation? "A. That's right.

"Q. What office do you hold? "A. Vice-president.

1257 "Q. Are you an officer of North Fork Coal Company? "A. Yes.

"Q. What office do you hold with that? "A. President and Treasurer.

"Q. Are you a stockholder in that corporation? "A. Yes.

"Q. How many stockholders does North Fork Coal Corporation have? "A. Two.

Deposition of James W. Haley

"Q. Who is the other stockholder? "A. The other is my nominee, who is my secretary. R. R. Magee is her name.

"Q. When did you first become interested in North Fork Coal Company? "A. In 1956.

"Q. Is Mr. Roger Cooper interested in North Fork Coal Company? "A. No.

"Q. Did North Fork Coal Company hold any leases of land from the Kentucky River Coal Company? "A. Yes.

1258 "Q. Does it still hold that lease? "A. Yes.

"Q. Has it subleased that property? "A. Has what subleased?

"Q. North Fork Coal Corporation subleased that property? "A. What property?

"Q. The property which it leased from Kentucky River Coal Company? "A. Some of it, yes. Some of it, no.

"Q. What amount of property is involved in the lease or leases from Kentucky River Coal Company to the North Fork Coal Company? "A. Well, I don't know how to answer that exactly.

"Q. Is it a large acreage? "A. Fairly large, yes.

"Q. This is coal property? "A. Yes.

"Q. Our subpoena asks that you bring in copies of leases of North Fork Coal Company from Kentucky River Coal Company. Did you bring those leases?"

Mr. Kramer: Now, your Honor, this witness was represented by his counsel, and counsel for his company.
1259 We did not participate in the discussion, and we object to reading any portion of the discussion between his personal counsel and counsel for the defendants here.

-(The reading of the deposition was continued.)

"Q. Are you a practicing lawyer, Mr. Haley? "A. Not in the sense that I have, well for the reason that I don't have any time to practice law. But I am an attorney by profession and the Chief Legal Officer of our company.

Deposition of James W. Haley

1260 "Q. Are your leases of North Fork Coal Company from Kentucky River Coal Company of record in the Registrar's Office or Recorder's office of the county wherein the land lies? "A. No."

"Q. You have not recorded those leases? "A. No."

"Q. Are subleases of the property by North Fork Coal Company to any part of record? "A. No."

"Q. Is Kentucky Oak Mining Company mining coal on Kentucky River Coal Company properties?"

"The Witness: In answer to the question, I don't know."

"By Mr. Rowntree:

"Q. You do not know whether Kentucky Oak Mining Company is mining coal on property owned by Kentucky River Coal Company? "A. No. How would I know 1261 that?"

"Q. Mr. Haley, our subpoena asked you to bring in papers showing the loan transaction whereby a bank or banks loaned one million five hundred thousand dollars to North Fork Coal Company on or about May 11, 1959, which loan was secured by assets of United Mine Workers of America, this loan having been disclosed by United Mine Workers of America in the record in this case. Did you bring those papers with you? "A. Yes."

"Q. May I look at them? "A. Yes."

Mr. Kramer: Now, Your Honor will recall, I think — this is in May, 1959, and it is objected to because of the date of the alleged transaction being subsequent to the period involved in the alleged conspiracy. We say, Your Honor, it was incompetent for any purpose in connection with this litigation. It is not claimed that this company was a conspirator, anyway, and it is wholly irrelevant and immaterial for both reasons, Your Honor, and we object to it.

The Court: For what purpose is that testimony offered?

Mr. Robertson: This, Your Honor, it will be developed that the United Mine Workers, in accordance with our con-

Deposition of James W. Haley

1262 tentions—this is an example of pledging Union assets in a transaction, tying up coal properties in certain companies of their own choosing, keeping the properties out of the hands —

The Court: Objection is overruled.

1268 Mr. Robertson: We have two papers furnished as a late filing as Exhibit No. 1 to this deposition, were filed with the deposition, and on top of page 10 Mr. Rowntree identifies these papers. And the papers are a letter of May 5, 1958, from North Fork Coal Company by James W. Haley, president, to the National Bank of Washington. The other document —

Mr. Combs: I believe counsel is mistaken in the date. It is May 8.

Mr. Robertson: May 8th, 1959. And the other document is a Collateral Security Agreement executed by North Fork Coal Company dated May 7, 1959, referring to stock of North Fork Coal Company, Inc., leases and other documents.

At this time we would like to introduce these two documents as exhibits. The first one is the letter of May 8, 1959. (Exhibit No. 75 was marked for identification and filed.)

And the Collateral Security Agreement as Exhibit 1269. No. 76.

(Exhibit No. 76 was marked for identification and filed.)

Mr. Kramer: Of course, subject to the objection heretofore made, your Honor.

The Court: Yes, sir.

1270 Mr. Robertson: And further referring to papers which the witness had at the time of the taking of the deposition, but which are not offered here as exhibits, Mr. Rowntree's explanation identifying them:

"Customer's copy of deposit to the credit of North Fork Coal Company in the amount of fifty thousand dollars dated May 8, 1959. In the National Bank of Washington, another

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deposit credit to North Fork Coal Company in the National Bank of Washington dated May 14, 1959 in the amount of five hundred twenty-five thousand dollars; another deposit to the credit of North Fork Coal Company in the National Bank of Washington dated May 19, 1959, in the amount of two hundred thirty thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington dated May 26, 1959, in the amount of three hundred thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington dated June 4, 1959, in the amount of one hundred thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington, dated June 9, 1959, in the amount of two hundred ninety-five thousand dollars."

1271 "Mr. Rowntree: Those deposit slips, Mr. Haley, as I read them off, are they correct as I read them?"

"The Witness: I believe they are."

Mr. Kramer: Can we agree — it may be agreed to be considered as if they were here, but we do object as to relevancy and materiality.

The Court: Yes.

Mr. Kramer: In order to keep from coming in the record, need not produce them here.

The Court: Yes.

Mr. Robertson: I would like to read the letter, Exhibit No. 75, addressed to the National Bank of Washington, from North Fork Coal Company, by James W. Haley, president. It reads as follows:

"North Fork Coal Company hereby applies for a line of credit not to exceed One Million Five Hundred Thousand Dollars, (\$1,500,000), to be used for the purpose of purchasing coal leases and coal operating units in the Hazard Field of Eastern Kentucky.

"Involved in the proposed acquisition would be coal bearing leases together with tipples (coal loading and prepara-

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tion plants), involving approximately 65,000,000 tons mineable coal.

1272 "Kentucky River Coal Corporation is the predominant land-holding company in the Hazard Field. All of the properties involved herein are under lease from Kentucky River Coal Corporation.

"Applicant does not know exact terms of outstanding leases, but based on general knowledge of the field, is confident that the leases provide for an override ranging from 10¢ to 25¢ per ton. Potential income from the outstanding leases which applicant proposes to acquire could be as much as \$350,000 per year. In the relatively poor year of 1958, these lease overrides produced income in excess of \$100,000.

"The stock of applicant is closely held, 50% of it being owned by the president of the company and the remaining 50% by a nominee of the company. Of course, applicant would expect to pledge its stock and all leases and other properties subsequently acquired as collateral for the credit.

"Thanking you for your consideration of this application, we are."

The Court: That is the dominant lease-holder of what region, Hazard?

Mr. Robertson: Hazard field, yes, sir.

Reading from the first paragraph of the Collateral Security Agreement, Exhibit 76:

1273 "That the undersigned, in consideration of certain loans —" and the undersigned being North Fork Coal Company, James W. Haley, president — "That the undersigned, in consideration of certain loans, discounts, and other financial accommodations heretofore given or that hereafter may be given to the undersigned by The National Bank of Washington, of Washington, D. C., (hereinafter referred to as the 'Bank'), and for value received, has deposited with the Bank as collateral to secure the full and prompt payment of said loans, discounts and other financial accommodations, the following collateral, which the undersigned warrants that the undersigned has the right to

Deposition of James W. Haley

pledge, hypothecate, transfer, sell or use, to-wit:

"Stock of North Fork Coal Company, Inc., leases and other documents."

1274 "Q. Mr. Haley, this loan to North Fork Coal Company in the amount of one million five hundred thousand dollars was from the National Bank of Washington?

"A. That is correct.

"Q. What was the purpose of this transaction? Why did you want this money? "A. As set forth in the application for the purchase of coal properties in eastern Kentucky.

"Q. What person did you discuss it with first outside of your own company? "A. I discussed it, well, I don't recall what person I discussed it with first. In the course of the negotiations I discussed it with practically every important official of the Bank, Mr. Colton, Mr. Sanderson and other members of the bank.

"Q. Did you discuss it with any representative of United Mine Workers of America? "A. I did when it became apparent that I could not make the loan, negotiate it without security, I then discussed it with various officials of the United Mine Workers whom I had known over a period of years.

1275 "Q. Had you done business theretofore with the National Bank of Washington? "A. Yes, on a number of occasions I was Secretary and general counsel of the National Coal Association. We maintained a substantial account there. I was Treasurer of the Coal Exporters Association of the United States and had that account there. And I was a Vice President of the National Council of Coal Lessors and their resident representative. I recommended that they put that account there, and did.

"Q. So the National Bank of Washington does a lot of business in the coal industry? "A. I don't know about that."

"The Witness: I don't know anything about that. They have done a lot of business with me.

Deposition of James W. Haley

• • • • •
"Q. These associations you have mentioned, they are large associations, aren't they? "A. The National Coal Association is a large one. But the other groups, I would say, are quite small.

1276 "Q. How large is the National Coal Association?

What is its membership? "A. I have not been an official of the National Coal Association for more than ten years so I don't know.

"Q. Are you or any of your affiliated companies a member of the National Coal Association? "A. Jewel Ridge Coal Corporation is a member.

"Q. Is it not true that the National Coal Association includes the vast majority of the large coal companies of the United States? "A. I don't know.

"Q. You were an officer of the Association? "A. Yes, and at that time, it did.

"Q. Getting back to this loan, you did discuss it with representatives of United Mine Workers of America? "A. Yes.

"Q. With whom did you discuss it? "A. Well, at various times I discussed it with Mr. John L. Lewis, Mr. Thomas Kennedy, Mr. John Owen.

"Q. At what period of time with reference to the consummation of the loan did these discussions occur? "A. Simultaneously during the time I was negotiating with the bank.

1277 "Q. It didn't take long to consummate the transaction? "A. Well, in a matter of days, it might not look like a long time, but it seemed like a long time to me at the time.

"Q. What assets did North Fork Coal Company have at that time? "A. It had the leases to which you have been alluding.

• • • • •
"Q. Why did North Fork Coal Company want these

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leases? "A. North Fork Coal Company wanted the
1278 leases for the not unusual purpose of trying to make
money.

"Q. Was the property covered by these leases in operation in coal mining operation at the time the loan was consummated? "A. Some was and some were not.

"Q. How much coal was being extracted from these properties annually, immediately prior to the consummation of this loan? "A. I don't know.

"Q. Did you divulge to the National Bank of Washington or to United Mine Workers of America anything about the number of operations on those properties? "A. No.

"Q. Did they inquire of that? "A. I don't recall what they did. I don't recall that they did.

"Q. In other words, they didn't know if a single operation was on the property at that time? "A. I don't know what they knew.

"Q. They didn't ask you? "A. I don't believe they did.

Of course, they knew there were some operations on the property. I knew that, they knew that, both of them knew it.

Both of us knew it.

1279. "Q. What operations were on it? "A. I cannot recall specifically, but I will be glad to state that the principal operation was, on one of the leases I acquired was those operations operated by Mr. Roland Price.

"Q. What company did he operate? "A. Well, he operates four or five. I frankly don't recall the name of them.

"Q. Did his operation continue after the North Fork Coal Company acquired the leases? "A. Continued and enlarged."

"Q. Did North Fork Coal Company hold any leases to property prior to the consummation of the loan? "A. Yes.

"Q. Did it acquire leases subsequent to the consummation? "A. Yes.

"Q. Was the proceeds of the loan used in acquiring these

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additional leases? "A. Yes.

1280 "Q. Were all the proceeds of the loan used in the acquisition of these leases? "A. With the exception of a small amount that went into these business expenses.

"Q. Business expenses of North Fork Coal Company? "A. Yes.

"Q. You mean office operation expenses? "A. Yes. That is correct, normally.

"Q. What percentage of the proceeds was used for that purpose, roughly? "A. Less than two per cent.

"Q. So all the rest of the proceeds were expended by North Fork Coal Company in payment of leases acquired by North Fork Coal Company? "A. Yes."

"Q. Have you had any conversation in the year 1959 or subsequent thereto with Mr. William Sturgill or Mr. 1281 Richard Kelly? "A. I have had many conversations with them.

"Q. Do you have a close business working relationship with these gentlemen? "A. The business relationship I have with them, I don't know if you would call it close or otherwise, but it is strictly one of lessor and lessee.

"Q. Have you discussed the proceeds of this loan with these two gentlemen? "A. No.

"Q. Have you discussed financial transactions in general with these two gentlemen? "A. No, no other than our financial relationship between each other.

"Q. That relationship is that of lessee and sub-lessee? "A. That is correct.

"Q. Is this one of the parties who seek sublease property from North Fork Coal Company?"

1282 "A. I have admitted that they are lessees of North Fork, yes.

1283 Mr. Combs: On page 1085 the record reads: "Mr. Lewis has testified that Mr. Eaton, in regard to

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these notes, that the particular provision in these notes has no particular significance, except in a commercial transaction."

The word "except" should not occur.

It should read: "Has no particular significance in a commercial transaction."

The Court: All right.

Mr. Combs: It does make some difference.

The Court: All right, have the reporter to correct the record on that page.

Mr. Combs: Right. It appears in the fourth line from the bottom on page 1085.

1284 Mr. Robertson: If it please the Court and ladies and gentlemen of the jury, we will read the deposition of Mr. William B. Sturgill, taken in Hazard, Kentucky, on the 18th day of November, 1960.

(Thereupon, Mr. Robertson and Mr. Templeton read the following deposition.)

"WILLIAM B. STURGILL

after first being duly sworn, deposed as follows:

DIRECT EXAMINATION

By Mr. Robertson:

"Q. What is your name? "A. William B. Sturgill.

"Q. Where do you reside, Mr. Sturgill? "A. 104 Parkway Avenue, Hazard, Kentucky.

"Q. What is your occupation? "A. I am a coal merchant.

"Q. What company are you presently connected with? "A. I am President of the Kentucky River Coal Sales Company with offices in Hazard, Kentucky.

"Q. Are you connected with any other company in the coal mining industry? "A. Various.

Q. Are you connected with the Kentucky Oak Mining Company? "A. Yes, I am."

1285 "Q. Are you one of the owners of that company?

"A. I am one of the stockholders of that company.

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"Q. That's a corporation? "A. It is.

"Q. What office do you hold in that company? "A. I am Vice President.

"Q. Who are the other officers? "A. R. R. Kelly is President and I function as Secretary-Treasurer.

"Q. Do you know, Mr. Sturgill, how many shares of stock are outstanding in Kentucky Oak? "A. Yes, I do.

"Q. How many? "A. One thousand shares."

"Q. Is this a closely held corporation? "A. There are no other stockholders in the corporation but R. H. Kelly and myself.

"Q. Do you know who the incorporators of Kentucky Oak were? "A. Yes.

"Q. Would you state who they were? "A. Myself and R. H. Kelly.

1286 "Q. Is Kentucky Oak a fairly new corporation?

"A. It is.

"Q. When was it incorporated? "A. It was incorporated in the spring of 1959.

"Q. Do you recall what month in 1959? "A. No, I don't.

"Q. Is that a Kentucky corporation? "A. It is.

"Q. The stock as it was issued originally when the company was first incorporated, is that stock now held according to the way it was in the original issue? "A. The stock is held by those persons to whom the corporation issued the stock at the time it was incorporated. Then and now, and it has never changed hands in any direction.

"Q. How long have you been an operator, or in the coal mining industry in the Eastern Kentucky area? "A. I have been actively engaged in the, in the coal merchandising business since the spring of 1958. I have been actively engaged in the coal industry since the fall of 1959.

"Q. Could you tell just briefly your experience in the coal industry since 1949? "A. I could talk two and a half hours about that.

"Q. Let me ask you this way. You have been in coal

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merchandising since 1958. By that do you mean buying and selling coal?" "A. Yes, sir, buying and selling coal.

"Q. It is sometimes referred to as a coal broker? "A. That's right.

"Q. Have you actually ever been in the coal mining operation? "A. As an operator, are you asking?

"Q. As an operator? "A. I have not.

"Q. Is Kentucky Oak Mining Company an operating company? "A. It is not."

"Q. Let me ask you this then, being more specifically, being more specific. Is Kentucky Oak a coal merchandising firm? "A. Yes, yes.

"Q. It operates no mines of its own? "A. No.

"Q. Does it purchase coal directly from the other mines? "A. Yes.

"Q. Does it own coal lands or have leases to coal lands? 1288 "A. Yes.

"Q. Does it sub-lease that land to other operating companies? "A. Yes, it does."

Mr. Kramer: Now, your Honor, we object from here on, for this testimony is relative to periods subsequent to December 31, 1958, and we insist it is irrelevant and immaterial and other reasons heretofore given to similar testimony.

The Court: Same ruling. I overrule your objection.

Mr. Robertson: For the purpose of any clarification as to the purpose that we are putting it in, I might say at this time that this is the company to whom this North Fork Coal Company, which we had the deposition on yesterday, who was loaned money from the union, leased this land, these coal lands.

Mr. Kramer: All of which was subsequent to December, as your Honor will recall, December 31, 1958.

Mr. Robertson: Yes.

The Court: If this testimony has any bearing, members

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of the jury, on the ultimate fact that is involved in the lawsuit, namely whether there was or was not a conspiracy between the union and trustees and one or more of the coal operators named in the complaint, then the jury may consider it. If the testimony has no bearing on this ultimate issue, then the jury will not consider it. It has no bearing on the question of damages, because, as indicated by Mr. Kramer, the period is subsequent to the alleged damage period which closed on December 31, 1958.

(The reading of the deposition continued.)

"Q. Does it purchase the coal from those operating companies? "A. Yes, it does.

"Q. From whom does Kentucky Oak lease? "A. Various.

"Q. Coal properties? "A. Various companies, various land holding companies.

"Q. Does it lease any land from Kentucky River Coal Corporation? "A. It does.

"Q. Does it lease any land from North Fork Coal Company? "A. It does.

"Q. How much coal land is leased from North Fork Coal Company? If you don't know exactly, can you give rough—
1290 "A. I don't know exactly how much land —"

Mr. Kramer: Your Honor, this record will show our objection is continuing to all this line of testimony?

The Court: Yes sir. The same ruling.

(The reading of the deposition continued.)

"A. I don't know exactly how much land is leased by Kentucky Oak mining Company from North Fork Coal Company because we lease lands from, as I stated, Kentucky River Coal Corporation, privately held tracts of land from the Combs heirs in the vicinity of where this property is located that we lease from North Fork. We lease from Carrs Fork Coal Corporation. For me to determine how much coal we have under lease from North Fork, I couldn't do it.

"Q. Well, let me ask you this. Can you tell us how much coal properties you have under lease, total, from all of

Deposition of William B. Sturgill

these various companies from whom you lease? "A. In the so-called Hazard Number Four, 5A, 7 and 9 seams, we have sizable coal reserves under lease.

"Q. You don't have any idea how much, how many acres, for instance, that you have under lease? "A. I do not.

"Q. Or the coal reserves? "A. They are sizable. For me to break them down either by acres or tons, I would have to go to the maps or the records. I don't carry those 1291 figures around with me.

"Q. Is this considered to be of high quality coal?

"A. Hazard coal field, as such have four major seams in it, our lower seam is our better grade coals, and our upper seams are our lower grade coals. Our number 4 and number 5A coals are not what you would consider premium coals, but they are of higher quality than our upper seam coals, and we have acreage in all four seams.

"Q. All the coal lands which Kentucky Oak owns are in the Hazard Field, I take it? "A. They are.

"Q. Well, speaking relatively only of coal to be sold in the Hazard Field, is this coal which you have in reserves of high quality? "A. It is applicable to the industrial, domestic and utility markets.

"Q. Does Kentucky Oak own coal lands in its own name, in fee? "A. Yes, we do, we own coal lands, both surface and mineral in our own name, in fee.

"Q. Mr. Sturgill, could you give any rough estimate as to the percentage of the coal lands which Kentucky Oak hold under lease, which they are leasing from North Fork Coal Company? "A. I would hesitate, without looking at the maps to determine how much acreage, either in 1292 tonnages or land area, that we have under lease from them. It would be simply a matter of guess on my part, of our total holdings that we have from North Fork.

"Q. Would you say it was a substantial percentage? "A. I would, of our total coal holdings, I would guess that what we have, as a matter of guess, from North Fork, would be less than forty per cent of our holdings.

Deposition of William B. Sturgill

"Q. When did the Kentucky Oak actually begin business?

"A. We started acquiring leases in the, in the spring of 1959.

"Q. I take it then shortly after the corporation was formed? "A. Right."

"Q. Does Kentucky Oak presently have under lease lands which were originally leased by Kentucky River Coal Corporation to the North Fork Coal Company? "A. I will ask you to repeat that question, please, sir.

"Q. Does Kentucky Oak now have a lease of property which was originally leased by Kentucky River Coal Corporation to the North Fork Coal Company? A. Kentucky Oak Mining Company has under lease coal lands that are owned by Kentucky River Coal Corporation. To whom they were originally leased, I do not know.

"Q. Do you know who is the owner in fee of the coal lands which you are now leasing from North Fork Coal Company?

1294 "A. The Kentucky River Coal Corporation, I would imagine, would be the owners in fee of the mineral. The surface is owned by various and sundry people."

"Q. Are the royalties on this property paid to more than one party?

"A. The royalty has to do with the mineral, and the arrangements that we make with the surface owner would necessarily make it be paid to more than one party.

"Q. Are the royalties on the mineral paid to more than one party? "A. Yes, they are.

"Q. Do you know Mr. James W. Haley? "A. Yes, I do.

"Q. With whom were the, or is there one lease or more than one lease which Kentucky Oak has from North Fork Coal Company? "A. There is only one lease.

"Q. With whom did Kentucky Oak make this lease, who

Deposition of William B. Sturgill

represented North Fork Coal Company in these negotiations? "A. We negotiated these leases with James
1295 W. Haley.

"Q. Did anyone else take part in these negotiations? "A. They did not.

"Q. Was this, did you represent Kentucky Oak in these negotiations yourself? "A. Yes, I did.

"Q. Did Mr. Kelly or anyone else? "A. Mr. Kelly was with me in each of the conferences that was held that had to do with the leasing of the coal land.

"Q. Just the three of you negotiated? "A. As it had to do with North Fork, that's correct.

"Q. Do you know Mr. Robert Cooper? "A. Yes, I do.

"Q. Has he ever taken part in the negotiation of any of the lease which Kentucky Oak now has? "A. O stated earlier that we had leases from Kentucky River Coal Corporation. Those leases were negotiated with Mr. Cooper at the time he was president of Kentucky River Coal Corporation.

"Q. Does Kentucky Oak, is Kentucky Oak leasing any coal property from the Jewell Ridge Coal Corpora-
1296 tion? "A. No, we do not.

"Q. Is Kentucky Oak leasing any coal properties from Dr. Huston St. Clair? "A. No, we do not.

"Q. Has Dr. St. Clair acted in any way in any negotiations which Kentucky Oak has had? "A. He has not.

"Q. Where is this property, Mr. Sturgill, which is presently under lease from North Fork Coal Company?

"Q. In what counties are they found? "A. Without looking at the maps, I would say that all the coal that we have under lease from North Fork lies in Knott County, Kentucky.

"Q. Is there a seam in that property which is commonly known as the Number Nine seam? "A. Yes, there is.

"Q. Would you tell us anything about the thickness of that seam? "A. The Hazard, so-called Hazard Number Nine

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seam in that area, runs anywhere from eight and one-half to ten and one-half feet thick. As you move to the northwest of that area, the thickness of the coal is anywhere from five and one-half to eight feet thick. I think that would be the general thickness of the Hazard Number Nine seam found in this area.

1297 "Q. Are any of the coal lands which Kentucky Oak has under lease in Letcher County, Kentucky? "A. They are not.

"Q. Does the Kentucky Oak Mining Company own any mining equipment? "A. Yes.

"Q. Is it presently leased to other mining companies, operating companies? "A. Yes, it is.

"Q. When was this equipment acquired? "A. At various times.

"Q. Since the spring of 1959? "A. Since the spring of 1939, 1959."

Mr. Kramer: Now, Your Honor, I object again and move to strike the testimony that has just been given, and especially with reference to the machinery and equipment; because this evidence shows that this is not a continued course of dealing. It went on during the period of the alleged conspiracy, assuming the ending of the conspiracy at December 31, 1958, but none of these transactions with reference to this machinery occurred until — as his last answer says — the spring of 1959.

Under Your Honor's previous ruling, this is not a
1298 continued pattern. It is a deal that arose subsequent to and is not a continuation of any previous conduct. We think it is wholly irrelevant and immaterial even under Your Honor's previous ruling.

Your Honor's previous ruling was it showed a continuation of a course of conduct, but, Your Honor, this does not show any continuation of a course of conduct. It shows something that originated subsequent to December 31, 1958, and continued only since—or since the spring, to use the language of the witness — since the spring of 1959, and

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we most earnestly insist it is incompetent and irrelevant for any purpose and may be prejudicial.

Mr. Rowntree: If Your Honor please, we stated yesterday, there is a contention by the other side that we have to prove a dangerous probability of the attainment of the monopoly under Section Two.

This company, Kentucky Oak, has attained a position since our people went out of business of securing far and away the largest contracts with TVA. It is being produced on this property. This is a company, it has land which was —the assembly of which, procurement of which has 1299 been obtained with union funds.

This is the company in the eastern end of the system, TVA system, that is attaining this dangerous probability of monopoly. On the western end are two of the companies that we have mentioned in this case to the Court, big companies who we say have attained that dangerous probability.

Our main reliance on this testimony is on that question of dangerous probability.

Our main reliance on this testimony is on that question of dangerous probability.

The Court: Well, if your client is out of business, what does that matter to your client?

Mr. Rowntree: The question of dangerous probability comes up under the monopoly section. In a question of an attempt to monopolize, the tobacco company cases state that on that question, an attempt to monopolize, there must be shown a dangerous probability of the attainment of that monopoly.

When the monopoly is sought to be attained by running other people out of business, it is impossible to prove dangerous probability unless you look to see whether they have attained that position when they have run out of business of a number of other companies out of business.

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In other words, while our people are in business, 1300 while another of these other small companies is in business, it is impossible to prove that they have attained the dangerous probability. It is only after they have gone out of business that you can prove it.

The Court: Objection is overruled.

(The reading of the deposition was continued.)

"Q. Were any funds received by Kentucky Oak Mining Company from the North Fork Coal Company for the purchase of this equipment? "A. There was no funds received from the North Fork Coal Company or any other corporation, back or present, other than R. H. Kelly and myself, that bought the equipment for Kentucky Oak Mining Company."

Mr. Kramer: Now, Your Honor, we are making further objection because the statement was made yesterday that the money that was borrowed through United Mine Workers in Washington was being used for the furtherance of the conspiracy, that was the purpose for which they said it was tied in, and evidence introduced.

This evidence shows conclusively now there were no funds received from the North Fork Company—I am reading the answer the witness just read—"There was no funds 1301 received from the North Fork Coal Company or any other corporation, back or present, other than R. H. Kelly and myself, that bought the equipment for Kentucky Oak Mining Company."

So, Your Honor, the funds did not go and were not used, even assuming that this other evidence could be admissible for the purpose Mr. Rowntree has stated, this money was not borrowed, the UMW had nothing to do with the furnishing of the funds for the buying of the equipment we are now testifying about.

The Court: All right, then, the jury will not consider that.

Mr. Kramer: Then we ask, Your Honor, that that evidence be stricken.

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The Court: Do you want it stricken? If it proves your point, you want it in.

Mr. Kramer: I don't want any of that borrowing of funds, because it is immaterial in this case. Of course, if the borrowing of funds as testified yesterday goes in —

The Court: If this witness' proof shows that the funds were not borrowed —

Mr. Kramer: That's right, Your Honor.

The Court: You don't want the Court to let that
1302 out?

Mr. Kramer: I don't want to just take this part out, Your Honor. That isn't my motion.

The Court: Let it stay in the record.

1303 By Mr. Robertson:

"Q. Does Kentucky Oak own any augering equipment? "A. Yes, we do.

1304 By Mr. Robertson:

"Q. Can you state the number of augers which it owns? "A. We have three in number.

"Q. What size augers are those? "A. We have two augers that are forty-eight inches in diameter and we have one auger that's a so-called seven foot auger.

"Q. Are these augers leased to operating companies? "A. Yes, they are.

"Q. How did Kentucky Oak finance these augers?"

1305 "A. No, I think I want to answer the question. We dug down in Mr. Kelly's pocket and my pocket and got the money.

"Q. Of this property which is leased by Kentucky Oak from North Fork Coal Company, do you happen to know how North Fork acquired that property? "A. I don't know how they acquired the property.

"Q. Are there any improvements on that property? "A. Surface owners who own that property have improvements

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on it. I don't think, to my knowledge, I wouldn't know anything about North Fork's business.

"Q. There were no tipples or any such mining improvements on the property at the time that the lease was made from North Fork to Kentucky Oak?

Q. If you know, of course? "A. In the leasehold there is property with tipples on it that were leased from Kentucky River Coal Corporation."

Mr. Robertson: The next deposition is that of 1306 Mr. Albert B. Hill taken at Hazard, Kentucky, on the 18th of November, 1960.

Your Honor, in order to understand the reason for this testimony, I should like to read a provision from the National Bituminous Coal Wage Agreement 1950 as amended September 29, 1952, under the section on page 3 of that amendment entitled "Application of Contract to Coal lands."

Mr. Robertson: The wage agreement, under that section, reads as follows:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as 1307 a subterfuge for the purpose of avoiding the application of this agreement.

"ALBERT B. HILL

after first being duly sworn, deposed as follows:

By Mr. Robertson:

DIRECT EXAMINATION

"Q. What is your name, sir? "A. Albert B. Hill.

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"Q. Where do you live, Mr. Hill? "A. Pineville, Kentucky.

"Q. May I ask to the best of your knowledge, will you be living there during the period from January through May of next year? "A. Of next year?

"Q. Yes, sir. "A. Yes, I expect to.

"Q. In 1958 were you president of Black Star Coal Company? "A. '58—year and a half ago. Listen, I will say I was. It was so close that I can't—it took effect in December. It took effect, I will say, January 1st, last year.

"Q. 1959? "A. That's right.

1308 "Q. By taking effect, you mean that someone succeeded you as president of Black Star Company?

"A. Correct, and Black Star went out of existence.

"Q. What kind of business was Black Star Coal Company in? "A. Coal mining and sales.

"Q. Did it also own coal lands leased out to others to operate coal mining? "A. Yes, it did.

"Q. Operations on it? Where were those properties located? "A. In Clay County, in Wilton, right below Corbin. Can't think of the name of the — Clay County, primarily, Clay County and Leslie, and just below — let me see. Let me give you that in just a second. It's just passed my mind, that's all, and I know it as well as I know my own name. It's the same county that Barboursville is in.

"Q. Knox County? "A. Knox County, I couldn't think of it. That's correct.

"Q. I believe the Knox County property was called Wilton or Corbin tract? "A. Correct.

"Q. And you also had property in Leslie County? "A. In Leslie County and in Clay.

1309 "Q. Did you—how many acres were in those two areas? "A. May I bring this word in. When that was—the way that was handled as of January 1st, Black Star went out of existence, and then this new corporation, Black Star Company, was formed as a sales agent. What was your question?

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"Q. Do you recall how many acres old Black Star had?

"A. Old Black Star?

"Q. Yes, sir; yes, sir. "A. Wait a minute—about 16,000 acres.

"Q. In both counties combined?"

"A. In both counties, and this Wilton property.

"Q. Did Black Star, the old corporation, have property in West Kentucky? "A. No.

1310 "Q. Did old Black Star have a coal mining operation? "A. They did.

"Q. Where was that? "A. That was at Alva, Kentucky.

"Q. Do you recall what county that is? "A. Harlan County.

"Q. What kind of a mine was that? "A. It's a deep mine, mechanical loading, hand loading, all forms of mining underground, except auger.

"Q. Was there any stripping? "A. Yes, there was some stripping. Wait a minute, we did a little augering, too. That's on a lease contract, though.

"Q. And that mine was operated by old Black Star Coal Company? "A. Correct.

"Q. Now, was Black Star Coal Company purchased by anyone? "A. Yes, it was.

"Q. Who purchased it? "A. I knew this was going to get into that. I just can't tell you, gentlemen, I just don't know the details of that entire transaction.

"Q. Who succeeded you as President? "A. Clarence A. Lee, Sr.

"Q. Is he a resident of Alabama, before that time was he a resident? "A. He was at that time, and still is.

"Q. Do you know if that company that bought old Black Star was the Marigold Coal Company? "A. I can't tell you just how it was worked out. I never asked and was never told.

"Q. Do you know if Peabody Coal Company had an interest in or owned the company of Mr. Clarence J. Lee?

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"A. Clarence A. Lee.

"Q. Clarence A. Lee? "A. I don't know.

"Q. Now was a new corporation formed called Black Star Coal Company? "A. Yes.

"Q. And that's the company that Mr. Clarence A. Lee became President of? "A. Yes.

"Q. Did all of the properties of old Black Star Coal Company come under this new Black Star Coal Company? Did all the properties of old Black Star come under the new corporation? "A. All that was left.

"Q. And what was left? "A. Black Star, I mean, 1312 Alva, Kentucky. That's the original Black Star Coal Corporation.

"Q. What became of the coal lands in Wilton area, Knox County and Leslie County? "A. We still own them. Mr. Lee still owns them.

"Q. That's the new corporation? "A. No, sir, that's not right. The Black Star, the old Black Star Coal Corporation was formed as a sales agency all together, and they—they do not own and as far as I know did not own any part of Alva. After it was sold to interest that I cannot, I just can't tell you who they are because I don't know.

"Q. Does, did the name of the company that owned the Alva Coal mine, after this transaction, change its name? "A. Yes.

"Q. What did they— "A. Alva Coal Company, Alva Coal Company or Alva Coal Company, I think it was.

"Q. Was Mr. H. C. McCollum President of that company? "A. Gentlemen, I would say I think he was. I am not absolutely positive of that.

"Q. Did you have an office in that new company? "A. I did, I did.

"Q. What was your office? "A. Executive Vice President.

1313 "Q. Who was President? "A. I am going to come back and tell you McCullem was, but I have never seen that in black and white.

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"Q. And Mr. H. C. McCollum is Vice President of Peabody Coal Company? "A. That's correct.

"Q. And did Alva Coal Company also own these tracts of land over in Leslie and Knox County? "A. They owned, they owned a sizable acreage bordering on the Harlan County line, in that portion.

"Q. And that's the property that old Black Star Coal Company used to own? "A. That's right.

"Q. Did the, is the Alva Coal mine in Harlan still in operation? "A. No, sir.

"Q. When did it close? "A. Approximately three months ago.

"Q. Why did it close down? "A. Inability to mine profitably, and they will tell you running out of coal. I don't tell you that because they have got coal.

"Q. Are you still connected with Alva Coal Company?

"A. I am not.

"Q. Mr. Hill, back under the old Black Star Coal Company in the period of 1956, did Osborne Mining

Company make an effort to lease land from Black Star Coal Company in that period of time? "A. Well, I can't say exactly at that time, but in the neighborhood, but approximately the same time, we leased property to Osborne.

"Q. Osborne Mining Company was a non-union operation? "A. It was.

"Q. Were negotiations had with respect to that leasing of property by Osborne Mining Company? "A. Was what?

"Q. Were negotiations carried on? "A. Oh, yes, we were negotiating with Osborne during the entire time he had the property. Then he subleased or he sold out to Callahan.

"Q. And then they made an effort to come back on that property, is that right? "A. I don't recall that. I know this, he would like very much to.

"Q. Well, you did have some negotiations with Osborne Mining Company? "A. Yes.

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"Q. With respect to their coming back on the 1315 property? "A. Yes, I would say that we did. Now, gentlemen, that's a long time ago and when I make a statement like that, it's to the best of my knowledge.

"Q. Will you state whether or not a lease form was drawn up to lease that property to Osborne Mining Company? "A. Mr. Rowntree, I would have to just, to refer to the records before I answered that question. If you want the best that I recall, will give it to you.

"Q. All right, sir. "A. I think it was. But that would have to be sustained by the records in Louisville, Kentucky.

"Q. Now why was that lease not executed? "A. I just don't remember the details, we just couldn't get together. That's going wack back, gentlemen.

"Q. Can you state whether or not this lease was refused by you? "A. If it is confirmed that that lease existed, then it would have been refused by me because I would have handled it.

"Q. Do you recall that you testified about the subject before in a case? "A. I remember quite well.

"Q. And do you remember the reason you stated at that time why that lease was rejected by you? "A. I couldn't tell you off-hand.

1316 "Q. Are you acquainted with Mr. John L. Lewis?

"A. Yes, sir.

"Q. Have you had conversations with him? "A. I certainly have.

"Q. On what occasion? "A. On renewal of contracts.

"Q. Was Black Star Coal Company, was it a member of any coal association? "A. It was not a member of the Harlan County Association, therefore, we negotiated our own contracts.

"Q. Directly with the United Mine Workers officers? "A. Yes, sir.

"Q. Will you state whether or not you carried on these negotiations each time a new contract came out? "A. Yes.

"Q. Now with respect to the, to the old Black Star prop-

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erties in Knox and Leslie County, will you state whether or not there were non-union operators on those properties under lease from Black Star? "A. They were non-union operators.

"Q. Did any question arise between you and Mr. Lewis on any of these contract negotiations with respect to non-union leases? "A. Yes, it was certainly discussed, and that's the reason I went to Washington and had a very definite and clear understanding with Mr. Lewis, 1317 and I must say that he lived up to it one hundred percent.

"Q. Did you live up to it one hundred per cent? "A. Yes, sir, I sure did."

Mr. Combs: May it please the Court, we want to object to the testimony from here on in. Counsel is going into the question of application of contract to coal lands, as he started out.

It is our position and our contention that the application of contract to coal lands in the contract was a subject that was negotiable under the Taft-Hartley Act; that it was a question that the operators had to negotiate upon; and it is a question that the union had a right to negotiate.

It is contention that for that reason that the question of the application of coal lands in this case is not applicable to a charge of violation of the anti-trust act. That by converting a legal right of the union and the operator — remember that both parties signed these contracts. That by trying to convert a legal act of both parties, one of whom is compelled to bargain on this subject by law, to try to convert that into a violation of the anti-trust act I don't think can be done under the cases, and for that reason we would like to object to the continuing line of argu- 1318 ment concerning this application of lease to coal lands part of the contract.

Mr. Combs: If it please the Court, I would like 1319 to enter into a stipulation with counsel, if it is proper, that all of the contracts executed beginning in

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1941 through 1958 be entered into the record, because there will be parts of those contracts in issue in this case. Then we can specify what parts of the contract that each side is going to use.

The Court: You will stipulate, will you?

Mr. Rowntree: Yes. I didn't hear what he proposes.

The Court: The stipulation is that the entire bargaining agreement beginning in 1941 and was carried on through 1948 be made a part of the record and that each side have the privilege of reading such portions of such contracts as desired.

Mr. Combs: You said 1948. You mean 1958.

The Court: 1958.

Mr. Rowntree: Where do you want to start?

Mr. Combs: The '41 contract expired in '43, and a lot of the items we are talking about were carried forward 1320 successfully on up through 1958.

Mr. Rowntree: Start in '41?

Mr. Combs: Yes. You must have the '41 contract to get a complete picture of all the contracts that are involved, and our stipulation covers all of them.

The Court: Do you want to comment on Mr. Combs' objection to this testimony, Mr. Rowntree, and, if so, state the purpose of such testimony?

Mr. Rowntree: If your Honor please, it is our position that this clause that was read by Mr. Robertson a moment ago in the '52 amendment is not really clear. We want to show how the union construed it with respect to their right to determine who could operate on coal lands.

It is our position that the union did exercise a lot of control with respect to who could operate on coal lands, and that parties had to go to the union who had contracts with the union to discuss with the union who could operate on their lands.

We asked Mr. Lewis in the deposition specifically if he recalled Mr. Albert Hill. His testimony was that he could not, that it was one of a number of other conversations.

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It is our position that this is a typical bargaining
 1321 negotiation that the union participates in to deter-
 mine who can operate on coal lands of signatory op-
 erators.

We think that it goes beyond the terms of this contract. It certainly clarifies the understanding of the union of how much power it has over this question.

The Court: Mr. Combs states that evidence on this point is not competent to show any violation of anti-trust laws because the contract resulted from collective bargaining which the parties had a right to do under the Taft-Hartley Act, and you can't make a legal bargaining and a legal contract, that results from a legal bargaining, a violation of another federal law, when it is legal under the Taft-Hartley federal law.

Now that is his point. The point is, as I understand him — he has made it heretofore — that that which the union did and the operators did on the subject under consideration was done legally under the Taft-Hartley Act.

If his premise is sound, he says you can't take a legal act, under the Taft-Hartley Act, and make it an illegal act under the Sherman Anti-Trust Law; that if it is legal under one act, under one federal law, it is legal under all
 1322 federal laws.

What is your reply, if you have a reply, to that basic objection?

Mr. Rowntree: Under the anti-trust law, where your motive and purpose is to restrain trade or to monopolize, you can accomplish that motive by legal means and still be in violation of that statute, where you do have these motives of restraint of trade and monopolization. The legality of the particular act that you use is not controlled.

The Court: All right.

1323 Mr. Combs: Your Honor, there is just one distinction that I would like to make at this time in connection with counsel's argument, and that is this, that the Taft-

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Hartley Act requires—it requires the operator or the employer to bargain on these items that we are talking about, and if they reach an agreement, it requires them to reduce this agreement to writing..

I think that is a different situation where you may have certain rights under the law as distinguished from duties, and of course the purpose of the Taft-Hartley Act, the announced purpose in the law, Congress said, is to obviate these disputes, these industrial disputes by compelling the employer to bargain with the union, and I think that is a very valid distinction between the idea that you can use a legal instrumentality to further a violation of the conspiracy under the Anti-trust Act.

The Court: Now what you said, the Court believes to be correct, Mr. Combs, but in reply to that, Mr. Rowntree says even though the law requires you to do those things, and you do them in accordance with the applicable law, if you collaborate with private business, and if the motive in the collaboration is to restrain trade in a certain industry—here it is the coal industry—and to monopolize a segment of that industry, if that is the motive, then even though that which he was required to do under the Taft-Hartley Law becomes violative of the Sherman Anti-Trust Law.

Now what about that?

Mr. Combs: Well, the case that comes to my mind readily is the *Hatchinson* case where the Supreme Court says that you could not take a statute that gave a right or compelled a person to do something under one statute and you couldn't introduce another statute to say that that person is going to prison.

That is my answer to that, and we must remember that the Anti-trust Act also has criminal provisions that are parallel to the civil end of it, and I think it is applicable in this case. I think there is a difference there.

Mr. Robertson: Your Honor, may I say that here, as Mr.

Combs has said, it is not the union that is compelled to bargain, it is the operator who is compelled to bargain. And here we do not have a situation where the union is compelled to bargain on this issue, and then be penalized under the anti-trust Act.

1324 The Court: Aren't they both compelled to bargain under the Taft Hartley if they are the collective bargaining agent?

Mr. Robertson: If the operator is compelled, then of course the union has a right to bargain on that particular subject, but so far as I know, the Taft-Hartley has no compulsion whatsoever on the labor union to bargain on any particular.

Mr. Combs: Oh, yes, it does. I didn't mean it that way. It certainly does. No question about it. You have case after case that the union is required, if they are the majority representative in the appropriate union, they are required to bargain for everyone in that union including non-members of the union.

The Court: Yes.

Mr. Rowntree: If Your Honor please, there is certainly no compulsion on the union to bargain to obtain a boycott on coal lands, and we say that is what they have been doing. There is no requirement in any statute which requires a union to do that, and I think it is a little bit unusual type argument to say that a union is required to attain that purpose.

Mr. Combs: Well, of course, counsel is assuming
1325 that it is a boycott. I am saying that this particular clause has been negotiated, it has been through the machinery of the Board, of the Labor Board, the proper tribunal. It's been through that, and if there is a charge of boycott, that is to be handled with the Labor Board. This is the first time I have heard counsel argue it is a boycott. If it is it should be before the Labor Board, and not before this Court

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Mr. Rowntree: If Your Honor please, there is no remedy in the Labor Board for a boycott. A boycott remedy is in this Court right here. This is the only Court that can protect parties in a conspiracy in restraint of trade.

Mr. Combs: I don't want to debate that with counsel, but I simply point out, and I think counsel would agree with me that one of the sections of the Taft-Hartley Act not only gives remedy for a boycott, but it is mandatory for a Labor Board to ask a District Court for an injunction where they have reasonable cause to think that boycott is being committed, and then counsel tells me that he hasn't any remedy.

Now the boycott section, as Your Honor well knows, has nothing to do with the Anti-trust Act. The Act itself gives a person who claims he has been harmed by a boycott, gives the person a right to go to a Federal Court to seek redress in a civil suit, and to seek an injunction against that boycott, if they think there is one going.

Mr. Rowntree: If your Honor please, counsel knows very well the extreme limitations surrounding the boycott in the labor law. We ran into it in the Love and Amos case. I am sure he is familiar with how restrictive that boycott provision and the remedy is.

It is certainly not in any Labor Board; it is in this Court even under the labor law, but there is no remedy in the labor law for a straight-out boycott as distinguished in a secondary boycott under the labor law. There is no remedy for a company that's been barred from land by a boycott pursuant to a conspiracy in restraint of trade of monopolization.

Our sole remedy is under the anti-trust law; the labor law gives us no remedy; there are no labor statutes between the coal company, the small company and the union when it seeks to go to some other party and get coal land.

If Your Honor will recall, in the Love and Amos case, it was expressly held that the only parties that can recover

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under boycott under the labor law are secondary
 1327 employer and the primary employer. Now we can't
 fit either one of those when a small company goes
 to a big company that's got coal lands and asks to get a
 lease and he is barred, because of the boycott pursuant to
 an anti-trust purpose.

The Court: Well, I'm going to let this testimony go into
 the record.

Mr. Combs: Your Honor, pursuant to the stipulation, I
 have copies of the contracts in pamphlet form that I would
 like to give counsel, if counsel wishes to put it in the record
 at this time. I will stipulate that it is in printed form.

Mr. Kramer: In other words, the pamphlet goes from
 '41 to '56, and then '58 is in the printed form so that the
 whole matter—

Mr. Robertson: We will ask then that the booklet
 1328 entitled, "Wage Agreement between Southern Ap-
 palachian Coal Operators Association and District
 Nineteen, United Mine Workers of America," together with
 the document entitled, "National Bituminous Coal Wage
 Agreement of 1950, as Amended December 31, 1958," be
 filed together as the next collective exhibit.

(Exhibit No. 77 marked for identification and filed.)

(The reading of the deposition was continued.)

"Q. What was this understanding? "A. When I went
 to Washington, D. C., at first—"

Mr. Kramer: Before we read, so we won't interrupt, we
 understand that all of this from here on to the end is sub-
 ject to the objection that we have made?

The Court: Yes, sir.

"A. When I went to Washington, D. C., at first— we
 had six or eight, no, we had about twelve or four-
 1329 teen leases, and I told Mr. Lewis that the one require-
 ment, that we held and we would not do otherwise,

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was the fact that those fourteen leases were under contract. Mr. Lewis—but I agreed, during the life of the contract, we would not negotiate another lease on our properties unless it was with union labor. We lived up to that literally.

“And another time I went to see Mr. Lewis, I told him that the conditions were such that I had no alternative but to go into this adjoining territory at Hyden and make leases. And I frankly stated that we were going to make those leases regardless because it meant our life in business. And Mr. Lewis discussed it at length, of course. He tried to talk me out of it, but he couldn’t, and so finally, we agreed on a gentlemen’s agreement, nothing in writing, that we would continue on that basis, and that’s the way it’s been.

“Q. Were the two trips you made to Washington about this matter? “A. It was about renewal of the new contract.

“Q. In other words, the trips were at different times?

“A. Yes, sir.

“Q. At different contract negotiation periods? “A. Right.

“Q. Do you recall when the first trip was? “A. This last contract, I had nothing to do with it, that was 1330 signed, it was signed in St. Louis. But the two previous contract periods were the two that I have reference to.”

“Q. I have here, Mr. Hill, copy of National Bituminous Coal Wage Agreement of 1950, effective March 5, 1950, with amendment of January 18, 1951, effective February 1, 1951; also the amendment of September 29, 1952, effective October 1, 1952; and the amendment of September 1, 1955, effective as of that date; the amendment of October 1, 1956, effective as of that date.

“Now looking at these, you can tell me which two contract periods you were talking about there, with respect to these trips to Washington? “A. I made the statement I

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had been there twice. It is entirely possible I was there three times. It was up to me to negotiate the contracts."

"Q. Yes. "A. Now with all the contracts that 1331 have come up over the past, I don't know, ten to fifteen years, I have sat in on those, and I have negotiated with the Union, except this last one, and that contract was signed in December in the offices of Peabody Coal Company. I was not in on that; I did not go to Washington.

"Q. Was that the one with respect to the Alva 1331a Coal Company? "A. That's right.

"Q. Were the two conversations you had with Mr. Lewis with respect to these Kentucky lands, were they concerned with a specific provision of the National Bituminous Coal Wage Agreement, as amended? "A. If I understand you correctly, the discussion I had with Mr. Lewis was a renewal of the existing contract, with the additions that they added on to it, and that was the case every time I went up there. I don't know if I understood you correctly.

"Q. I will show you a provision here in the amendment of 1952. You will note that's September 29, 1952. "A. 1952.

"Q. Amendment has this provision over here on page 3, captioned, 'Application of Contract to Coal Lands.' Did that—state whether or not that particular provision had something to do with your discussions with Mr. Lewis? "A. Yes, sir, that was the clause that got me to go to Washington.

"Q. And when that contract amendment came out, did that lead to the Washington trip? "A. Mr. Lewis, we discussed that, and he says, if that's your interpretation of it, then that's the agreement we will abide with, as far as you are concerned. But that did not mean he would go 1332 to John Jones and give the same contract. That's the way I took it.

"Q. Will you state why this interpretation you had was not put in writing between you and Mr. Lewis? "A. No, contract that I have had with Mr. Lewis, outside of the na-

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tional contract, there's nothing been put in writing with Mr. Lewis. Now frankly, I didn't want it and he didn't want it. It was a gentlemen's agreement that was abided by.

"Q. What was— was there any difference between you at the outset, with respect to the interpretation? "A. Yes, they didn't think we ought to make any leases, and we said we were going to make leases, but we did not make any leases that was adjoining a part of our main boundary of coal. In other words, a part of Black Star, we made no lease because we felt it was a part of the contract, that was our interpretation.

"Q. Were these discussions at some length or did you just state your position? "A. We, — it was a round-robin discussion.

"Q. Of some length? "A. Yes, sir.

"Q. Did you discuss the leases that you were wanting to make? "A. Yes, sir, it was all the lease we had in 1333 effect and two more than I had given my word on that we would close. I said we are going to close those two mortgages.

"Q. Those two leases? "A. Those two leases, and we did.

"Q. And you had already made an agreement with the proposed lessees? "A. Verbal agreement.

"Q. What was the final decision then? "A. Mr. Lewis said if that's your interpretation, we will accept it, as far as your case is concerned.

"Q. And the problem was, was that these proposed lessees were non-union operators?"

* * *

"Q. Will you state what was the specific problem? State whether or not it related to whether or not these operators were union or non-union? "A. Sure it was. That was the main consideration there, that these non-union operators wanted to continue, and we made the leases to the non-union operators. And we had signed contracts, and we had made verbal promises that we were going to abide by. Mr. Lewis

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knew that and he acquiesced and told me, I repeat, that if that was our interpretation, that would be the interpretation for our particular contract.

"Q. Now on the next contract negotiating period, 1334 did you go back to Mr. Lewis again? "A. Yes, sir.

"Q. Was that — "A. That was around '56, something like that.

"Q. That next one here, I believe, September 1, 1955? "A. It was the next regular contract."

"Q. And on this next trip to Mr. Lewis, did you have leases in mind at that time? "A. Yes, sir.

"Q. Of non-union operators? "A. Definitely.

"Q. And did you discuss those specific leases with Mr. Lewis? "A. I did."

"A. Gentlemen, it's the regular contract. Now, I don't want to go out on a limb. I am not positive on that. But every contract that was signed by Black Star over all those years, I had signed. The Union would not accept even my plant manager's signature. I had to make special trips over to Middlesboro, then. What we have been talking about, it was the first twelve or fourteen, plus two that I had given my verbal assurance that we would sign. Then we 1335 went back on this new contract when it was to be decided, and that was a boundary of coal which was what we call the heart of our whole proposition. I went over and told him we had to make leases on that coal or go out of business and in the final analysis, Mr. Lewis agreed with me for me to go ahead. I could tell you something else, but it's personal.

"Q. And that was true on both of these two trips? "A. Yes, sir."

"A. Mr. Lewis agreed I would add an unnamed number of leases on this new property. On the last trip."

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Mr. Kramer: That was my statement, "On the last trip," and now you may read the answer. "A. On the last trip.

"Mr. Kramer: But you don't mean to testify that was true on both trips? "A. I mean this, the first trip we were discussing relating to twelve or fourteen, or maybe fourteen to sixteen.

"Mr. Kramer: Already in existence? "A. Already in existence, and two that were submitted. But that left no coal whatsoever to be mined on the other side of the river. I went back to Mr. Lewis, it was a cut and dried proposition as far as I was concerned, that it had to be. Therefore, we were going to go regardless, even if you shut us down, we were going to go in that, that new territory. Am I clear on that now?"

Mr. Kramer: Omit my comment. Go ahead.

"A. And Mr. Lewis agreed, we would go ahead. I even talked to him about sending, sending one of his representatives to Louisville. I said, I will open my books, where you can see everything there is to see. He never did. He appreciated the offer of them.

"Q. What leases were talked about on that second trip? "A. They hadn't been formed yet, but in the end they were the Liberty Coal Company, the Carrie Lou Coal Company, the Deby Coal Company, the Kentucky Mountain Coal Company, Citation Coal Company and Black Gem Coal Company. Gentlemen, there may be one or two others, but those were the main ones.

"Q. Did you talk to Mr. Lewis about these companies? "A. I talked to him about the companies that were to be formed and the leases that were to be made. No names were given them.

"Q. And Mr. Lewis agreed to those? "A. Yes, sir, he did.

"Q. Mr. Hill, why did you feel compelled to go to talk to Mr. Lewis about these matters? "A. To get these contracts, and the only way we could do was to lay the matter

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on the table with Mr. Lewis, and I did just as frankly and sincerely as I knew how.

"Q. And he appreciated your sincerity? "A. He certainly did.

"Q. And you abided by your agreement? "A. I certainly did.

"Q. And you did not make any other leases? "A. No, sir. Wait a minute, on this last trip, I made, I may be one or two short, but I gave you the main ones.

"Q. But you did not make any leases except those Mr. Lewis agreed to? "A. No, not while that contract was in effect.

"Q. What is your position now, Mr. Hill? "A. I am the personal representative of Mr. Clarence A. Lee and Mr. Clarence A. Lee, Jr., in full control of all his property over here now, owned by Mr. Lee."

Mr. Combs: May it please the Court, we are now going into cross examination. May I state the position of 1338 the Union with reference to this particular deposition?

The Court: Yes, sir.

Mr. Combs: The question involved was one of the application of the coal lease lands. The position of the union is that is entirely a legal clause within the rights.

The deposition will show you on cross examination that the conference was arranged by counsel for Mr. Hill. The question was one of interpreting that clause by counsel on both sides in the meeting.

The question was, so that the Court and the jury may understand what the principals were talking about, was the application of that particular provision on leases that had already been executed in either writing or verbally.

Mr. Hill took the position that the contract could not be retroactive with reference to any lease or promise that he had made.

Deposition of Albert B. Hill

Mr. Lewis agreed with him on that on the advice of counsel.

I thought I would point that out, and it will be in the cross examination and we would like to have it of record.

1339 (The cross examination was read.)

CROSS EXAMINATION

By Mr. Combs:

"Q. Mr. Hill, at the time you went to Washington that you were talking about, who went with you? "A. Mr. B. F. Reed.

"Q. Who was your counsel at that time? "A. Judge Dawson.

"Q. Judge Dawson? "A. Yes.

"Q. And you talked to him about this before you went? "A. Oh, yes.

"Q. Mr. Rowntree was asking you about the renewal of these contracts. I think you said you had personally signed each of the contracts since about 1952? "A. I think I had.

"Q. You don't mean to say you went to Washington? "A. No, sir; no, sir.

"Q. You negotiated your contracts usually in the District office, you signed the contract and it was sent in to Washington? "A. Yes, sir.

1340 "Q. The two trips you went to Washington was with reference to the leasing proposition? "A. Yes, sir, and the new contract.

"Q. Do you recall who was present with Mr. Lewis? "A. You and Mr. Hauk.

"Q. Anyone else? "A. Mr. Reed. Of course, he was with me. Mr. Lewis, and there was one young man that I can't recall his name. If you call it I will remember it.

"Q. Mr. Willard Owens? "A. Mr. Owens was not there on one of them. He's the one that's president now. He was in one of those meetings.

Deposition of Albert B. Hill

"Q. Now, Mr. Hill, in order to get this picture very clear, at the time you went to talk to Mr. Lewis, your mine that was operating, was not operating under the new contract at that time? "A. That's right, it hadn't expired yet.

"Q. The question was whether you were going to sign the new contract or amended contract? "A. That's right.

"Q. And the discussion you had there with reference to the leases on your producing property was one more legal in nature than it was a bargaining proposition, was it not?

"A. I don't know that. I understand you.

"Q. Had you not been advised by your counsel, 1341 Judge Dawson, and did you not say to Mr. Lewis that you were legally obligated on the leases that were in existence at that time? "A. Yes, sir.

"Q. That they had some time to run? "A. Yes, sir.

"Q. And that you could not legally — "A. (Interrupting) We could not legally get out of them and we wouldn't if we could.

"Q. And you further said that you had two leases promised that had not been executed? "A. Yes, sir.

"Q. And you felt morally bound because there was a verbal agreement that they would be carried out? "A. Correct.

"Q. So it was a legal proposition with reference to the producing company's mine? "A. Yes.

"Q. That Mr. Lewis agreed to? "A. Yes, sir.

"Q. That was the interpretation, I believe, both of Mr. Lewis' counsel and your counsel? "A. I don't see anything wrong in that.

"Q. When you were talking about the leases in 1342 Clay and Leslie Counties, you were not talking in terms of your company operating mines on its properties, were you? "A. No, sir.

"Q. I believe you told Mr. Lewis at that time that your company's stockholders who owned that property, that that was the only way they could get income from the property was by leasing? "A. That's right.

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"Q. And the only people you could lease it to, that wanted the property, was non-union operators? "A. Everything in that field was non-union.

"Q. And the people you would lease that to had not been under contract? "A. That's right.

"Q. And the argument with Mr. Lewis was that you had not negotiated, and had not been negotiating with reference to your producing companies for the property in Clay and Leslie Counties? "A. I was referring to Alva as the main one.

"Q. That's right. And you did not think that the contract covered or should cover or would cover the property that your company was not producing coal on? "A. That's right. But if we had property, and we did, if we had property adjoining our main boundary, we felt this contract—

"Q. Would come under that contract? "A. That's
1343 right. And we would not sign it without that definite understanding.

"Q. In other words, you are talking about this contract here, and the contingency of the lands on that property? "A. Right.

"Q. Now, you were speaking in terms of agreements and understandings that you and Mr. Lewis had that had to do with your interpretations of the legal situation that existed at that time, of the leases on the company's property. It wasn't an agreement at all, it was just a recognition, wasn't it? "A. It was permission, if you want to use that word, that he was agreeable that we go ahead and make these additional leases or make these leases.

"Q. I think both of us mean the same thing. The question before you and Mr. Lewis at that time was whether or not you would sign this new contract? "A. That's right.

"Q. Now you wanted to know, before you signed that contract, whether it was his interpretation, understanding,

Interrogatories Propounded to J. S. Routh, Jr.

that it would cover these other properties? "A. That's right.

1344 "Q. And from the reasons stated, from the legal proposition stated, he would recognize the fact that it did not cover the pre-existing leases and properties that were not adjacent to this property? "A. He said he would go along on a gentlemen's agreement that these leases would be acceptable, that I would have no difficulty, and I have never had one minute's trouble.

"Q. That was in case you signed the contract? "A. I told him if my understanding was the same as his, or his the same as mine, I was ready to sign the contract. And I did, I went into the next office and signed the contract.

"Q. Now, the second trip was about the same, about the same circumstances? "A. The second trip was on leases that had not been made and it was on territory that I had told Mr. Lewis we would not make leases on. The first trip was over, was when fourteen or fifteen leases already signed, and two to be added. Now, when I got over here, that's on this new territory, I hadn't even approached it to anybody, but I told him we were going to close leases on that property, and he agreed that I do it.

"Q. But your company did not operate that property?

"A. No, sir.

1345 "Q. And didn't intend to? "A. No, sir.

"Q. And you never operated it? "A. We never operated it.

"Q. It was just a question of leasing lands that your company was not going to operate on? "A. That's right. That clause comes into it. That was my interpretation, and I would have closed Black Star had we not agreed.

"Q. And this was consistent with the advice of your counsel, Judge Dawson? "A. Yes, sir."

J. S. ROUTH, JR.

Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, we have the interrogatories pro-

Interrogatories Propounded to J. S. Routh, Jr. .

pounded to Mr. J. S. Routh, Jr., executive vice president of The Pittston Company.

1346 "Question: Where do you reside and what is the distance of your residence from Knoxville, Tennessee? "Answer: My residence is Meadowcroft Road, Greenwich, Connecticut and is 670 air miles from Knoxville, Tennessee.

"Question: What official position do you hold with The Pittston Company and what is the nature of your duties in that position? "Answer: I am Executive Vice President of The Pittston Company and my duties are the general supervision of all of our subsidiaries, under the direction of the President.

"Question: Attached hereto as Exhibit 1 to these interrogatories is a statement concerning the financial position and operations of The Pittston Company. Will you state whether or not the statements in this Exhibit 1 are correct and, if not, will you state what corrections should be made thereto? "Answer: The statements in Exhibit 1 at the time they were printed by Moody's Industrial Manual were correct."

We will read from that statement, your Honor, those portions which are before December 31, 1958.

The statement is under the heading The Pittston Company.

1347 "Incorporated in Delaware and Virginia. Originally incorporated Jan. 13, 1930 in Delaware. Upon merger Dec. 31, 1942, with United States Distributing Corp. (Va- Pittston Co. also became a Virginia Corporation."

"In Aug., 1944, company purchased 83.2% of outstanding common stock of Clinchfield Coal Corp., which owns or controls about 300,000 acres of coal lands. Clinchfield was merged Dec. 28, 1956."

Mr. Kramer: That was '44 rather than '54.

Mr. Rowntree: 1944, that is when they purchased the company. That company — I mean 83.2 per cent of that

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company, and that company was merged into Pittston December 28, 1956.

"Mar. 31, 1948, company purchased entire capital shares of Amigo Smokeless Coal for \$500,000, which company in Apr., 1948, purchased E. C. Minter Coal Co. with two bituminous coal mines at Beckley, W. Va."

"As of Nov. 1, 1957, acquired entire capital stock of Banner Fuel Corp., a bituminous coal producing company in Virginia.

"In Dec., 1958, acquired Elk River Coal & Lumber 1348 Co., owning 80,000 acres of coal lands in northern West Virginia, containing reserves of over 250,000,000 tons of high-grade, low-sulphur coal."

With respect to these last two transactions, your Honor, we have read heretofore —

The Court: I didn't catch them. Would you read them again.

Mr. Rowntree: These last two, the last one was with reference to the Elk River Coal & Lumber Company, purchased in December 1958.

The Court: You mean Pittston purchased that?

Mr. Rowntree: That is right.

The Court: Purchased what now?

Mr. Rowntree: Elk River Coal & Lumber Company.

The Court: Where it is located?

Mr. Rowntree: It is in northern West Virginia.

The Court: What was the other one?

Mr. Rowntree: The other one was Banner Fuel Corporation, purchased November 1, 1957.

The Court: Where is Banner Fuel?

Mr. Rowntree: That is in Virginia.

The Court: All right.

Mr. Rowntree: With reference to the Elk River Coal & Lumber Company, we had testimony with respect to the

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1349 purchase of that company and the signing of the contract. With respect to Banner Fuel Corporation, we now make reference to United Mine Workers Journal January 15, 1958, page 6.

Mr. Kramer: Now, your Honor, to the testimony with reference to the Elk River and Banner Fuel and there is another one who is outside of this territory, I forgot the name, that counsel has read, they are wholly outside of this area. It is in northern West Virginia, it is in the State of Virginia. They do not enter into our field or this field at all, where this plaintiff is participating or could be participating or was participating in the production and sale of coal, and we object to it as being irrelevant and immaterial and confusing and perhaps prejudicial.

We do not think it has any value whatsoever in this lawsuit, because it isn't in this area and has nothing to do with this area, has nothing to do with competition in this area, has nothing to do with monopolization.

The Court: The objection is good insofar as it relates to the damages of the cross plaintiffs Phillips Brothers Coal Company, but it is overruled as to the other features of the case for the reason that the cross plaintiffs are contending that there was a national conspiracy, and if this testimony has any bearing on the national conspiracy
1350 and it affected this plaintiff directly and proximately, then the jury may consider such testimony.

Now isn't that the purpose of it?

Mr. Rowntree: Yes, sir, it is to prove a national conspiracy.

This Journal article is under the heading "District 28 Organizes Banner Fuel."

"Banner Fuel reneged on its UMWA contract more than two years ago. Since then, the District 28 pensioners of the UMWA Welfare and Retirement Fund have been spearheading a strike to bring the miners there back into the Union. A picket line was kept going for more than two years. Most of the pickets were the 'old men' of Southwest

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Virginia who showed up every day, rain or shine, hot or freezing."

"The strike, led by these 11 and others like them, was more than successful and forced the scab operators of the mine to sell out to Clinchfield Coal Corp., which was scheduled to sign a contract with President Carson Hibbitts of District 28 effective January 1. The mine, formerly poorly mechanized and a real death trap, normally employs 80 men, but when Clinchfield commences full-scale mechanical production 50 employees will be hired."

"Safety conditions under the scab operators were truly horrible. Five men were killed in roof-falls over a two-year period and safety practices non-existent. A Labor Department hearing examiner — E. West Parkinson — scathingly indicted the company for its negligence and recommended that it be forbidden to sell coal to the Federal government for a three-year period."

The Court: Is that the Banner Fuel Company?

Mr. Rowntree: Banner Fuel Company.

The Court: And Banner Fuel was taken over by Clinchfield?

Mr. Rowntree: Taken over by Clinchfield after a two-year picketing by the pensioners.

The Court: And Clinchfield merged with The Pittston Company?

Mr. Rowntree: That is right.

The Court: All right.

Mr. Rowntree: The merger had already occurred before this.

I would like to read tonnage from the Exhibit One to the interrogatories. I will have to read it in round figures, there is a little haze on some of these figures.

This is coal produced —

The Court: Now what are you reading from?

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Mr. Rowntree: This is the statement with respect to Pittston Company, the portion on tonnage produced.

You might go with me on these figures.

The 1950, 6,373,000.

1951—these are tons—7,329,000.

Mr. Rowntree: 8,840,000 was 1952.

1953, 8,557,000.

1954, I believe that is 6,450,000.

1955, 8,050,000.

1353 1958, 8,058,000.

1956, 10,291,000.

1957, 12,634,000.

1958, 10,040,000.

Also, from this statement to get the nature of this company, it is a holding company, Your Honor, with a coal division. The coal, —

“A holding company with a coal mining division holds securities of subsidiaries engaged in directly or otherwise in one or another of the following lines of business: mining of bituminous coal, operation of retail stores at mines, wholesaling and retailing of anthracite and bituminous coal, petroleum products, natural gas and other fuels, armoured car operations; general trucking, truck rentals, warehousing.”

So it is a rather broad holding company.

Mr. Kramer: Your Honor, there is one other of
1354 these interrogatories that we wish to have read.

The Court: All right.

Mr. Kramer: It is number six. I want to go back to number five first.

“Question: Does the Pittston Company or any of its subsidiaries or divisions have any other operations with re-

Interrogatories Propounded to J. S. Routh, Jr.

spect to coal mining in the State of Tennessee other than the Clinchfield Division mine at or near Monterey, Tennessee? "Answer: No.

"Question Six: Does the Pittston Company itself have a contract with the United Mine Workers of America and is this contract the so-called 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: No."

Mr. Kramer: Number seven.

1355 "Question: Does the Clinchfield Division of the Pittston Company have a separate contract with the United Mine Workers of America and is this contract the so-called 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: Yes."

1356 Mr. Combs: May I make one comment in connection, Your Honor, with reading from Moody's Industrial Manual and picking out particular companies. As we have said before, that is an industrial book that they use as a reference work. Counsel has been reading and picking out particular companies.

We have pointed out, and this document will show that these companies own a number of coal mines. These large coal companies are made up of a collection of smaller mines in different states under different circumstances, and under different conditions.

Now, I think it is only fair that it is the contention of the Mine Workers that they not buy non-union mines as counsel is talking about, but very, very frequently, they buy union mines, so there is no significance to that. These large companies buy these mines, and it is the collective bunch of mines that they buy, so they are changing constantly in the industry.

Mr. Kramer: Who are you going to read?

Mr. Rowntree: Clinchfield Coal Division.

The Court: Interrogatories of whom?

*Interrogatories Propounded to R. R. Hughes***R. H. HUGHES**

Mr. Rowntree: Mr. R. H. Hughes, President of the
1357 Clinchfield Coal Division of the Pittston Company.

"Question: Where do you reside, and what is the distance of your residence from Knoxville, Tennessee?

"Answer: I live at St. Paul, Virginia, which is approximately one hundred fifty miles from Knoxville.

"Question: What official position do you hold with the Clinchfield Coal Division of Pittston Company, and what are your duties in that division? "Answer: I am president of the Clinchfield Division of the Pittston Company. As Chief Executive of the Clinchfield Coal Division, I direct the operation of seven bituminous mines employing 3,300 people. This direction includes production planning both public and labor relations, financial management, quality control and improvement and expansion of the division's activities.

"Question: Does the Clinchfield Coal Division of the Pittston Company operate a mine at or near Monterey, Tennessee, which mine is or was formerly known as the Meadow Creek Mine? "Answer: Yes.

"Question: When did the Clinchfield Coal Division of the Pittston Company acquire this mine and commence to operate the mine? "Answer: November 30, 1953.

1358 "Question: What is the annual tonnage capacity of this mine, and give the approximate number of employees employed in the mine. "Answer: 450,000 tons per year; 116 employees.

"Question: Does this mine operate under a contract with the United Mine Workers of America, and is this contract known as the 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: Yes.

"Question: Does the Clinchfield Coal Division of the Pittston Company operate any other coal mining operations or mines in Tennessee other than the mine at or near Monterey, Tennessee? "Answer: No."

If Your Honor please, this next series of short depositions

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deals largely with a charge we make that large operators aided the union in knocking out a rival union, Progressive Mine Workers of America, from certain important mines, this being part of the arrangement or agreement between the major companies and the union.

Mr. Combs: May I make an observation, Your Honor?

The Court: Yes, sir.

1359 Mr. Combs: The activities that are covered by this deposition that counsel talks about are activities that were involved in a charge before the National Labor Relations Board. The Board held hearings of three weeks duration. The trial examiner made recommendations to the Labor Board. The Labor Board granted—which it doesn't often do—an oral hearing on the exceptions to the charges of the trial examiner.

1360 The Labor Board approved the Trial Examiner's report as modified. The Labor Board went into the 7th Circuit for an enforcement of its order—7th Circuit Court of Appeals.

The parties—they had three respondents there. The Union, the local union, the company, and certain individuals.

The Court of Appeals reversed the Labor Board in practically all of its findings. The question of certiorari is now before the Labor Board, and they have told us that they expect to take certiorari to the Supreme Court on certain points. They are not going to take certain other points that they had because of the decision that your Honor knows about in the recent typographical series of cases that was decided by the Supreme Court last week.

The deposition was taken from the persons that were involved in this Labor Case that has gone to the 7th Circuit and now before the Supreme Court.

I think, your Honor, that is a typical illustration of the contention of the Union, that these charges have no part in an anti-trust suit.

I might say, that if we go into them exhaustively, I think

Statements of Counsel

it will be practically necessary for the persons involved to try to state their contentions to this Court and to this jury to see who is right.

The Labor Board found, in most all of the instances that the Union was right.

So that is an illustration, your Honor, that I would like to comment on and what we are going into here. And we object, of course. The object of my contention is that we object to this line of testimony on the same grounds that we have others, that this matter that they are going into is a matter that is in the exclusive jurisdiction of the National Labor Relations Board. That board has taken jurisdiction in this particular case and there is no purpose of it being tried out in the courts, and we don't think it could be any part of an anti-trust action under the decisions.

Mr. Rowntree: If your Honor please, we are not here trying an unfair labor practice. This unfair labor practice charge is not a remedy for our company. We weren't involved in it.

We do not grant counsel's statement with respect to the decisions in the Labor Board matter. We think they have nothing to do with it. But just to clear the record, the Labor Board hold in favor of the Progressive Miners and 1362 after that the mine was closed by Peabody Coal Company. The case became somewhat mute after that. The mine was permanently closed and stripped after that decision by the Labor Board. It has nothing to do with this case.

Our case is to show how closely Peabody Coal Company worked with the United Mine Workers to hurt the Progressive Mine Workers and knock them out of those mines as showing the arrangement and agreement between the major coal company and the union, being part of the whole pattern of the relationships between the major coal company and the union that we allege were part of this national conspiracy.

Deposition of Herbert C. McCollum

We do not want to seek any remedy for unfair labor practice. That is certainly beyond any issue in this case. But how closely they work together is an issue, for their mutual advantage.

Mr. Combs: There is one thing that counsel has said about the stripping of those mines. I know of no evidence of that act whatsoever.

Mr. Rowntree: There is.

Mr. Combs: As I said, the cases now before the Labor Board are being asked for certiorari before the Supreme Court. I think one of the mines did shut down, been worked out. I don't know of any contention that had anything 1363 to do with the union or not. My point is simply this, your Honor, that if we are going to try these Labor Board cases, that you have a Labor Board case in front of you. And as I said before, that is exactly the same person, the same activities, the same charges, that counsel is going into here on his side.

He has his contention and we have ours, but those contentions were tried. As a matter of fact there are countless charges before the Labor Board between the union and operators and if you want to pick and choose you can go all over the country. That is what the Labor Board is for, to decide those.

This is the deposition of Mr. Herbert C. McCollum
1364 taken in St. Louis, Missouri, October 20, 1960.

HERBERT C. MCCOLLUM

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. Herbert C. McCollum, M-c-C-o-l-l-u-m.

"Q. What is your position, Mr. McCollum? "A. Vice-President in charge of Underground Mines for Peabody Coal Company.

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"Q. How long have you held that position? "A. Since about 1954."

Mr. Rowntree: If your Honor please, all of these depositions are not confined to that issue. This is the general Peabody set of depositions but they do go into that question I was talking about.

Mr. Kramer: Insofar as they go into that question, our objection is in the record. When they come to other questions, of course, we will make further objections. But 1365 our objection, as I understand your Honor's ruling, stands as to this portion of the deposition.

The Court: Yes, sir.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Where do you reside, Mr. McCollum? "A. St. Louis.

"Q. You were Vice-President in charge of underground mines in 1957, I believe? "A. Yes, sir.

"Q. In or about May, 1956, did Midwest Coal Company acquire the capital stock of Midwest Radiant Corporation?

"A. Yes, sir.

"Q. Was Midwest Coal Company a wholly owned subsidiary of Peabody at that time? "A. Yes, sir.

"Q. At that time or immediately prior to that acquisition did Midwest Radiant own and operate a strip mine at Millstadt, Illinois?

"Q. Did Midwest Radiant also own the capital stock of Perry Coal Company? "A. Yes, sir.

"Q. And did Perry Coal Company own and operate 1366 the St. Ellen Mine at O'Fallon, Illinois? "A. Yes, sir.

"Q. In July, 1957, did you write certain letters to Progressive Mine Workers of America as Vice-President of Midwest Radiant Corporation and as Vice-President of Perry Coal Company? "A. No, sir.

"Q. That was Mr. Snider? "A. Yes, sir.

"Q. I show you a letter, Mr. McCollum, dated July 10,

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1957, from Hugh White, President of District 12, United Mine Workers of America, addressed to you at your Peabody Coal Company address. Did you receive that letter in the mail? "A. Yes, sir."

Mr. McCombs: While we are hunting for that letter, may our objection run to the exhibits offered under this line of testimony? The Court: Yes, sir.

Mr. Rowntree: This letter states—it is dated July 10, 1957 on the letterhead of the United Mine Workers of America, District 12, signed by Hugh A. White, president. It is addressed to Mr. H. C. McCollum, Peabody Coal Company, at St. Louis.

i367 "Dear Mr. McCollum:

"You are hereby formally advised that the joint Bituminous Coal Wage contract to which the Peabody Coal Company was signature is effective at any and all mining operations operated by the signatory company. Full compliance to the terms of the aforesaid agreement is expected from the Peabody Coal Company by the United Mine Workers of America."

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. I show you here copies of letters, July 4th, 1957, from Ray Dupee to Perry Coal Company and Midwest Radiant Corporation, letter dated August 34d, '57, from Ray Dupee, to Midwest Coal Corporation, letter dated August 3rd, from Ray Dupee to Peabody Coal Company, and letter dated August 3rd, '57, from Ray Dupee, that's D-u-p-e-e, to Midwest Coal Corporation, and ask—

"Mr. Zempel: You do have two to Midwest Radiant Corporation?

"Mr. Rowntree: One is Midwest Radiant and one is Midwest Coal Corporation. And I will ask you if these letters were received in the mail by you?

• • •

"The witness: I no doubt received the letters addressed to

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Perry Coal Company. Midwest Radiant, I don't have 1368 anything to do with.

"Q. What about the one to Peabody Coal Company? "A. Peabody Coal Company, no doubt I saw that.

"Q. And Midwest Coal Corporation? "A. Yes, I think I saw all these letters.

"Q. July 4, 1957, letter of Ray Dupee to Perry Coal Company, and Midwest Radiant Corporation and Midwest Coal Corporation and Peabody Coal Corporation, all addressees at the top of the letter, mark that as Exhibit '2'."

Mr. Rowntree: These letters, your Honor—

Mr. Kramer: We object to the letters or any reference thereto. Your Honor has followed, no doubt, that these letters are not to the United Mine Workers of America; United Mine Workers are not a party to the letters at all. They are letters by Dupee to the Midwest—incidentally, Dupee is president of the Progressive Miners and not in anywise affiliated with the United Mine Workers. Statement by an outside third party, unsworn to, pure hearsay, and how in the world they could bind us or have any effect on us, I do not see.

The Court: Certainly those letters are not competent to prove the contents in them. In other words, that would be hearsay testimony and you cannot prove facts, or alleged facts, contained in the letters by such method.

1369 Now what is the purpose—what is the limited purpose you seek to introduce them?

Mr. Rowntree: The limited purpose, your Honor, is to show that—and perhaps we can just state the substance of it rather than read them all or put them into the record—

Mr. Kramer: We object to the stating of the substance.

The Court: They are competent as bearing on the contest between this alleged Progressive union and the UMW and on the alleged part that these big coal operators took in that controversy.

They are competent for those limited purposes only, but

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if a letter states thus and thus is so, you don't find that which it states is so. It is not competent for that purpose. That is to say, you cannot prove the contents of the letter by the letters themselves, but you may look to the letters as bearing on this relationship between this alleged Progressive union and the UMW and the big coal operators.

Mr. Kramer, if you have any doubt about that ruling the Court had it up over and over in the picture show cases and the roofing case and in the—well, I am not sure of the other case, but—

1370 Mr. Kramer:

What we have here that they are attempting to introduce is two letters—the ones I am objecting to. One dated July 4, 1957—three letters—no, two—and one dated August 3, 1957, written by Mr. Ray Dupee, president of the progressive Mine Workers of America.

1371 Now it is not by a coal company at all. I know what your Honor ruled with reference to the picture show people and so on in those cases. I read those. But, your Honor, I think this is beyond the scope of that. This is another union.

The Court: A letter to whom?

Mr. Kramer: It was — the letter was written, one to Midwest Coal Corporation and the other one was written to the Midwest Radiant Corporation.

The Court: The Midwest is a subsidiary of Peabody, is that right?

Mr. Kramer: Yes, it is, your Honor.

The Court: Of course, Mr. Kramer, that is not competent to prove anything in it, is correct, or anything in the letter is a fact. You can't prove facts that way. You are exactly right on that point. But it is competent to show that there was a contest there or an alleged contest between these parties.

For example, Mr. Kramer, in the picture show cases, the

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picture show people introduced hundreds of advertisement notices. You know how advertising is used. You know how they advertise, brag on themselves.

Mr. Kramer: They brag a little, your Honor.

The Court: They wanted to show that advertising, show strategic location of these theatres. The Court let that advertising in as bearing on that question only, but not to prove the contents of the advertising, because that comes under the hearsay rule.

The Court is instructing the jury the best it can to not consider this proof as providing the contents of the letters.

Mr. Combs: I understand the ruling on that. I just want to make one remark, though.

These letters here are from the president of the Progressive Mine Workers of America protesting to the company that they want to bargain with them. The other letter that he has is the letter from a president of a district of United Mine Workers in which he is asking the company to bargain with the Mine Workers.

Now as of now, as of this very minute, the Seventh Circuit Court of Appeals has an outstanding decree ordering an election by the Labor Board between this fight between these two people. There is an outstanding decree on that right now. Of course, it is subject to going on to the Supreme Court, as I told your Honor.

These same letters —

The Court: Can't you stipulate on this overall question?

Mr. Rowntree: I would like to, your Honor, if counsel will work with us.

The facts are all in here, and I think the facts bear upon the question of the major coal company, Peabody Coal Company working with the United Mine Workers.

The Court: The Court has held that you can't prove your facts that way because what those letters state about those facts —

Deposition of Herbert C. McCollum

Mr. Rowntree: We are not proving that by these letters. We just want to show the notice that Peabody got from Progressive, that they were the contract collective bargaining agent.

Notice was given in these letters by Progressive Mine Workers to Peabody that Peabody was the collective bargaining agent, had a contract with Peabody at these mines. That is the substance of the letter. I will let it go at that.

The Court: In the opinion of the Court, the letter is clearly competent for that limited purpose.

1374 Mr. Combs: Counsel was talking about stipulating. Let me make one more remark in connection with that court's decree:

That court said that this company was caught in the middle. The Seventh Circuit said that. That is not me saying that, or either one of the unions. The Seventh Circuit said the company is caught in the middle. They have got a typical union fight, two unions, one wants to represent the employees. So the Seventh Circuit ordered the Labor Board to hold an election under the auspices of the Labor Board, see which one does represent the men. That is the situation there.

So how that can have any bearing on the anti-trust case here, I don't know. It is a contest between two unions.

I will stipulate from the time the charges start right on up to the hearing —

The Court: Let me see the letter. I don't want to let anything get into this record, if I can avoid it.

The Court: Just read the third paragraph of that letter and don't read any other part. It may be filed.

1375 Mr. Rowntree: This is the letter of July 4, 1957, from the president of Progressive Mine Workers of America to Perry Coal Company, Midwest Radiant Corporation, Midwest Coal Corporation, and Peabody Coal Corporation.

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This paragraph states:

"You and each of you are hereby advised that the contract now in existence between the Progressive Mine Workers of America, District No. 1, and the Coal Producers Association of Illinois is a valid and binding contract covering the operation of the Midwest Mine and the St. Ellen Mine, and that we shall expect from you full compliance with said contract and that you will comply with the wishes of your employees as to Union affiliation, and any future contract negotiations."

The Court: Members of the jury, in order that you may further understand the Court's ruling, that language which is read is not received as evidence to prove that the Progressive Union did have a valid and binding contract. That would be proof of a fact, but you can't prove a fact by that method. That would be hearsay. That would
1376 be self-serving and you will not consider that letter as proof of that alleged fact. But you may consider it as bearing on the notice of that union to the addressee of that letter that it was claiming that it had a contract with the operators.

If you have any other letters, let me see the paragraphs that you want in and let's keep out all other paragraphs that don't bear on this collateral question.

Mr. Combs: Yes, we will stipulate that it is substantially — the other letters are of the same character, without waiving our objection.

The Court: That is right.

Mr. Combs: One more observation.

The Court: The Court has ruled that the jury will not look at the other parts of this letter; only the part that he read to the jury is in this record for consideration by the jury. The whole document may go in for identification purposes only.

Mr. Combs: For clarification, I believe counsel would also stipulate that the question of whether or not that they

1377 had a valid contract in existence at the time the letter was written on this contention, that that was not in contention anywhere. They did have a valid contract.

The Court: All right.

Mr. Rowntree: We just submit to the record for identification these letters that I have referred to.

The Court: That is right.

Mr. Rowntree: As Exhibit 78.

(Exhibit No. 78 was marked for identification only.)

Mr. Combs: May we make this reservation? May we have the right of offering in evidence such exhibits that may have a bearing on this?

The Court: Yes.

Mr. Combs: Since I said they had a valid contract. The court did hold that they had a valid contract at the time the letter was written. That was not in contention. We may want to put some of those things in later on.

The Court: You may have that reservation.

Mr. Rowntree: Down at the bottom of page five.

(The reading of the deposition continued.)

"Q. Mr. McCollum, were written responses made to these letters" — that is the letters of Progressive.

1378 "A. Not by me.

"Q. Mr. McCollum, did you furnish the names of employees at the St. Ellen Mine to the United Mine Workers of America, or to Mr. Hugh White or an officer of District 12 of the United Mine Workers of America on or before July 10, 1957? "A. I can't recall the date. I did furnish a list.

"Q. You did furnish a list? "A. Yes, sir.

"Q. Do you know if it was furnished some several days prior to the date that United Mine Workers of America circulated a letter to the employees of St. Ellen Mine, or do you know? "A. I don't know. I can't recall it just now.

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"Q. Was that list furnished prior to the time that United Mine Workers of America was recognized as the collective bargaining agent for the employees at the St. Ellen Mine?

"A. Yes, sir.

"Q. Was that list submitted to United Mine Workers of America at the request of that Union or an officer of that Union or of District 12 of that Union? "A. Yes, sir.

"Q. Now, Mr. McCollum, did you attend a meeting of the Pit Committee which was also attended by the President of the Local of Progressive Mine Workers of America at the St. Ellen Mine a short time before United Mine Workers of America was recognized as the collective bargaining agent of the employees at the St. Ellen Mine? "A. Yes, sir."

Mr. Rowntree: For clarification, the Pit Committee I was referring to is the Grievance Committee, I believe, of Progressive Mine Workers of America.

"Q. Would you state your best recollection of what happened at that meeting? "A. Mr. Rowntree, that meeting happened four or five years ago and it is hard for me to recollect details that far back. I did testify in this recent hearing that we had, and I would like, if I could, to let that testimony stand because I related at that time what had happened in that meeting.

"Q. You have no firm recollection at this time as to what took place? "A. Well, it would be difficult for me to recall in detail.

"Q. Were you President of Alva Coal Company, "A. Yes, sir."

1380

"Q. How long did you hold that position? "A. Well, I held that position from the time Alva was acquired until the present time.

"Q. Did that company operate one mine? "A. Yes, sir.

"Q. You don't recall when it was organized or when the

Company started business? "A. No, I don't remember that."

The Court: What is the name of that mine?

Mr. Rowntree: That was Alva. We had discussion of that in Mr. Hill's deposition a moment ago. That is up here in Kentucky.

Mr. Combs: I think the evidence shows that mine has been under contract since 1951 or '2 before it was acquired by Peabody, if it did acquire it. There is no question here about that.

I could advise counsel, if he wants to know, since 1933 they have been under contract.

Mr. Rowntree: 1933.

Mr. Combs: Yes, sir.

1381 The Court: Where is Alva located?

Mr. Rowntree: That is near Pineville.

Mr. Combs: It is in Harlan County in Kentucky.

(The reading of the deposition continued.)

"Q. Where was that mine located? "A. Located in Eastern Kentucky. Paul, do you recall the name of that town?

"Q. Is it pretty close to the Tennessee line? "A. Well, it's in Harlan County, a small mining camp."

"Q. Pineville would be close, I think? "A. Our one mine is at Evarts, and this one is at — well, it's in Harlan County, Kentucky.

"Q. Is there a little community called Alva? "A. Yes. Yes, it's at Alva. There's another little town down there, I am not sure which is the post office address.

"Q. Was Mr. Albert B. Hill an officer in that company?

"A. Yes, sir.

"Q. Is that company still operating? "A. We have the Alva Coal Company, but no holdings in East Kentucky any more; that's been sold, that property has.

1382 "Q. Do you recall when it was sold? "A. Oh, about possibly a year ago."

*Deposition of Herbert C. McCollum***"CROSS EXAMINATION**

By Mr. Kramer:

"Q. There was one question asked that I didn't get, in relation to this, and that question dealt with the Alva Coal Company and the question was, or rather the answer, that you were President of Alva Coal Company from the time of its acquisition. By whom was it acquired, or what did you mean by its acquisition? "A. Peabody Coal Company.

"Q. Purchased the capital stock of Alva? "A. 1383 Correct.

"Q. And thereby became the owner of its assets of stock ownership? "A. That's right, sir.

"Q. Mr. McCollum, you were asked something about furnishing the names of the employees of, was it Perry Coal Company, to a representative of the United Mine Workers of America? "A. Yes, sir.

"Q. Were you ever requested at about that time, or any other time, to furnish the names of the employees of that company to other people or other organizations? "A. We have from time to time supplied names of our employees to insurance companies, charity organizations, and as a matter of fact nearly anybody that wants them.

"Q. Anybody that would ask for them? "A. Yes, sir.

"Q. Was that a practice that you followed at that time upon a request made to you? "A. Yes, sir.

Mr. Rowntree: This is redirect.

"REDIRECT EXAMINATION

1384 "By Mr. Rowntree:

"Q. Mr. McCollum, did the National Labor Relations Board enter an order in that case that you testified in?

"A. Yes, they did.

1385 "Q. Was the St. Ellen Mine closed after this order was entered? "A. The St. Ellen Mine was closed May 20, 1960.

"Q. Was that a permanent closing? "A. Yes, sir.

"Q. The equipment is being taken out of the mine? "A. Yes, sir."

1386 Mr. Rowntree: The deposition of Mr. Merl C. Kelce.
"MERLE C. KELCE,

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. Merl C. Kelce, K-e-l-c-e.

"Q. What is your residence, Mr. Kelce? "A. St. Louis.

"Q. What is your present position? "A. President and Chief Executive Officer.

"Q. Peabody Coal Company? "A. Yes, Peabody Coal Company.

"Q. How long have you held that position, Mr. Kelce?

"A. Since 1957.

1388 "Q. Mr. Kelce, I have handed to you a copy of Moody's Industrial Manual Statement on Peabody Coal Company, and I will ask you to file that as Exhibit '6'. If you will, state whether or not that contains a direct statement of Peabody Coal Company subject to your checking it later and filing an addendum to this deposition making any corrections that are called for?"

Mr. Rowntree: There were no corrections to that statement, Your Honor.

Mr. Combs: I think, though, you should read what Mr. Zempel said about that.

Mr. Rowntree: All right.

(The reading of the deposition was continued.)

"Mr. Zempel: We don't say it's correct, we don't know.

"Mr. Rowntree: I might state—

Deposition of Merle C. Kelce

1389 "The Witness: I am perfectly willing for him to make this an exhibit if it's subject to our check and correction if there is any.

"Mr. Rowntree: All right, sir."

Mr. Kramer: Mr. Zempel, Your Honor, was the attorney for the witness and not for the parties.

Your Honor, this same type of evidence we have gone over many times. I want to continue our objections for the reasons heretofore stated, and I take it it is not necessary to restate it.

The Court: Yes, in the opinion of the Court, the testimony is competent in the light of his statement that he will check it, and if there are any inaccuracies, he will check it and make an addendum.

Mr. Kramer: Of course, that wasn't the basis of the objection. It was this type of evidence, Moody's and so forth, is not competent in this lawsuit. It is irrelevant and immaterial. Not checking on Moody's. I assume he did check, and it is correct.

The Court: It is held that the information of Moody's, unless it is verified by the witness, is not competent, but the Court understands that he verified it.

Mr. Kramer: Your Honor has held it is admissible for a limited purpose.

The Court: That's right.

1391 Mr. Kramer: I am not raising an objection because of the accuracy, because he's checked it, but Your Honor has heretofore ruled it is competent for a limited purpose, and I assume Your Honor rules the same here.

Mr. Rowntree: Is your objection on relevancy?

Mr. Kramer: Yes, sir, relevancy, that it is wholly irrelevant in this lawsuit for any purpose whatsoever.

Mr. Rowntree: I might interject, Your Honor, that we have charged certain companies with being alleged conspirators. We don't think the case will be won or lost on the basis of this information, but certainly it is of interest to know

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something about these companies, how old they are, what subsidiaries they have got, and how big they are.

The Court: And the size.

Mr. Rowntree: That's right.

Mr. Combs: May I point this out?

The Court: Yes, sir.

Mr. Combs: The Moody's under discussion for 1960. Mr. McRoberts was counsel for Kelce at that time, personal counsel. Mr. McRoberts made this statement in connection with the accuracy of Moody's that they are talking about.

"I think the answer, Mr. Rowntree, is correct as 1992 far as it pretends to give any information. It is of course not complete."

That is our point, that—one of our points—1960 doesn't necessarily reflect in the least the condition of that company in 1958 or 1959. That is all it purports to be, and that doesn't purport to be complete.

The Court: Of course, if it doesn't, the jury will not consider it, but if the conditions shown in 1960 substantially existed in 1958, inasmuch as 1958 was the end of the period involved in this suit, then the jury will consider it.

Now, that is the purpose?

Mr. Rowntree: That's right, Your Honor. I think the dates specified here show clearly when these situations—what period of time they fell in. The great bulk on it shows on its face we are talking about a period of time before 1959.

In other words, dates are given with respect to certain transactions, that they occurred certain dates.

The Court: It deals with information within the period.

Mr. Rowntree: The great bulk of it, yes sir.

The Court: Well, of course, the jury may consider 1993 that for whatever it may be worth.

Mr. Rowntree: This is a statement headed "Pea-body Coal Company."

"Incorporated in Illinois May 2, 1928, as a consolidation of a predecessor corporation of the same name and Indus-

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trial Coal Company, Midland Counties Coal Company, Southern Counties Coal Company, Merchants Metropolitan Coal Company and Big Muddy Company. Subsequently, and particularly in 1928 and 1929 acquired Bellwood Coal Company, Federal Coal Company, American Eagle Colliery, Manufacturers Coal and Coke Company, Saline County Coal Corporation and Crerar Clinch Coal Company.

"In 1952—"

Let's see, it speaks about mergers and subsidiaries.

"On March 31, 1956, acquired Midwest Radiant Corporation and Perry Coal Company.

"On March 1, 1957, acquired Poplar Ridge Coal Company."

"In 1958 acquired remaining minority interests in Peabody-Southern Coal Company (liquidated in 1958) and Midco Mines, Inc., and remaining fifty per cent interest in River Queen Coal Company.

1394 "In November, 1958, acquired Mid-America Transportation Company, Kay Coal Company, and Alva Coal Corporation."

The subsidiaries are listed, but that is of 1960.

The Court: Now, what company are you dealing with there?

Mr. Rowntree: This is Peabody Coal Company, Your Honor.

"Affiliate: Simeo-Peabody formed in 1957 by company and Columbus and Southern Ohio Electric Company to mine coal leased from properties near Conesville, Ohio. Properties are owned by Stimeo, Incorporated, subsidiary of Columbus and Southern Ohio Electric Company, to which coal will be sold.

"Business and Products

"This company's business is principally the mining,

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jobbing and selling of bituminous coal. Through subsidiaries, the company also does a retail coal business.

"Coal Contracts Company serves most of important electric utilities in Midwest area.

"Sales contracts with electric utilities are either fixed price or cost-plus contracts. Fixed price contracts 1395 include escalation clauses which provide for increased prices under conditions of increased costs. Company considers contractual provisions adequate to protect it against cost increases which are beyond its control.

"In March, 1951, the thirty-year contract, dated May 1, 1928, with Commonwealth Edison Company, Public Service Company of Northern Illinois and Chicago District Electric Generating Corporation was amended and extended, effective May 1, 1951. New contract includes same Edison Group of utility companies and runs to December 31, 1982. Original contract had been scheduled to end April 30, 1958.

"Under new agreement, these utilities are required to purchase from company not less than fifty per cent and are entitled to purchase up to sixty-six and two-thirds per cent of annual Edison System coal requirements. New agreement extends approximately twenty-four years beyond life of superceded agreements. It provides that purchases will be made from coal produced by company at certain designated mines on a 'cost-plus' basis. This includes cost depreciation and depletion on contract mines, a return on company's net book investment balances in such mines computed at five per cent per annum, plus a profit of fifteen cents per ton of coal delivered: In addition, fixed 1396 charges and operating costs applicable to coal washing and other preparation plants at various mines covered by agreement will be shared by these utility companies on an equitable basis.

"Minimum annual obligation of these utility companies under the agreement will be 50% of Edison 1397 System Coal requirement or 2,000,000 tons, which

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ever is greater, but in no event in excess of 100% of such coal requirement."

The production by tons:

1950, 9,175,000	1951, 15,186,000
1952, 15,606,000	1953, 8,773,000
1954, 9,947,000	1955, 19,000,000
1956, 25,563,000	1957, 25,726,000
1958, 23,290,000.	

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Mr. Kelce, how many mines does Peabody Coal Company have operating?

"A. Twenty-five — between twenty-five and thirty mines that are now operating.

"Q. How many of those are strip mines? "A. As of August 1st?"

Mr. Kramer: This is 1960, your Honor, he is talking about now. This is subject to our previous objection.

"Q. Yes, sir. "A. All those mines are strip mines except one.

"Q. And which mine is that? "A. That's Mine 1398 - Number 10 near Taylorville, Illinois.

"Q. Is that a large mine? "A. Yes.

"Q. Approximately how many employees are employed at that mine? "A. Something over six hundred.

"Q. Do you know the annual production at that mine say in 1959?

"The Witness: No, it's public information. About three and a half million tons.

"Q. What is your largest strip mine or the most productive? "A. Well, there's two or three large mines, maybe one year one will produce more than the others. Our largest coal mine, strip mine this year, as I remember, it's our River Queen Mine, Western Kentucky.

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1399 "Q. In August, 1960, how many states did you operate in? "A. Let me figure it up. Five.

"Mr. McRoberts: Five mines you are talking about?

"The Witness: Five states. Is that when you said?

"Mr. Rowntree: Yes.

"A. Yes.

"Q. In which you have mining operations? "A. That's right.

"Q. Does Peabody Coal Company have a collective bargaining agreement with the United Mine Workers of America? "A. Yes.

"Q. Is that the National Bituminous Wage Agreement of 1950 as amended? "A. I think that's right.

"Q. When did Peabody Coal Company first sign that contract? "A. I don't know that we ever signed a contract. Our association — our coal association generally does that.

"Q. Do you recall when the Coal Association, which is your representative, first signed the contract on Peabody's behalf? "A. No, I wouldn't.

"Q. Was it prior to the transaction by which Peabody acquired the Sinclair Mine properties? "A. I can't tell you anything about Peabody Coal Company prior to the time they acquired the Sinclair property because I wasn't with Peabody.

"Q. Was the contract signed at the time the Sinclair Mines properties were acquired by Peabody coal Company?"

1401 (The reading of the deposition was continued.)

By Mr. Rowntree:

"A. I don't understand your question.

"Q. In the period of time say for two or three months after the Sinclair Mines properties were acquired by Peabody-Coal Company, was there a contract between Peabody Coal Company and United Mine Workers of America? "A. There was a contract with the United Mine Workers and

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Peabody Coal Company when Peabody Coal Company acquired the Sinclair properties.

"Q. Did the Sinclair Mines, Incorporated, have a contract with United Mine Workers? "A. Not that I remember.

"Q. Did the United Mine Workers of America furnish any financial aid in the acquisition of Sinclair Mines properties by Peabody Coal Company? "A. Absolutely not.

"Q. Has United Mine Workers of America furnished any financial aid or guaranteed any loans or furnished assets as pledges to guaranteed loans on behalf of Peabody Coal Company since that time? "A. Not one cent.

"Q. I believe in October, 1956, Peabody Coal Company issued thirty five-million dollars debentures, did 1402 United Mine Workers of America furnish any funds, or did they buy any of those debentures, to your knowledge? "A. None to my knowledge."

"Q. The Perry Coal Company operates the St. Ellen Mine, I believe, it operated it? "A. It did.

"Q. The stock of Midwest Coal Corporation at that time was owned wholly by Peabody Coal Company; is that correct? "A. In '56?

"Q. '56. "A. To the best of my recollection they did.

"Q. And Midwest Coal Company was the corporation that acquired the stock of Midwest Radiant? "A. Peabody Coal Company, you say?

"Q. Yes. "A. I think that's right."

"Q. Your answer is you are not certain as to which 1403 company owned the stock of which other company?

"A. That's right.

"Q. Peabody Coal Company was the parent company which wholly owned the St. Ellen Mine and the Millstadt Mine? "A. That's right.

"Q. And this acquisition, when did it occur, do you remember? "A. I am not certain, but it seems like it was in 1956.

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"Q. Was there any election held at those two mines prior to the recognition of United Mine Workers as the collective bargaining agent? "A. Not that I know of.

"Q. Now, on exhibit here, Exhibit 1 to Mr. McCollum's deposition, a letter dated July 10th from Hugh White of United Mine Workers to Mr. McCollum which refers to language of the National Bituminous Coal Wage Agreement, did Peabody Coal Company feel compelled to recognize the United Mine Workers as the collective bargaining agent, the employees at the Millstadt and St. Ellen Mine?

"A. I don't remember that letter, but evidently it passed over my desk because there is my initial on it. What was your question, Mr. Rowntree?

"Q. Why did Peabody Coal Company recognize United 1404 Mine Workers as the collective bargaining agent of those two mines? "A. Because the United Mine Workers brought in signed cards supporting they had a majority of employees.

"Q. Do you know, Mr. Kelce, when the Alva Coal Company was organized?

"A. It seems to me like it was 1958.

"Mr. Kramer: The date of its organization?

"The Witness: Yes. I wouldn't be sure of that, 1405 but it seems to me like that is when it was.

"Q. Was that property previously owned by Black Star Coal Company? "A. I don't understand what property you are talking about.

"Q. The Alva Coal Company at Alva, Kentucky. "A. Was it previously owned by the Black Star Coal Corporation?

"Q. Yes. "A. That's right.

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"Q. Do you recall if Peabody Coal Company owned at any time the stock of Black Star Coal Company? "A. No. It owned stock of the Lee Coal Company, as I remember.

"Q. Lee? "A. Yes.

"Q. Is that an Alabama corporation? "A. Yes. Clarence Lee lives in Alabama, I suppose it's an Alabama corporation. Am I correct there?

"Q. I mean, its principal office. "A. Principal office is Jasper, Alabama.

"Q. And the Black Star Coal Company also owned some coal lands which are leased out to operators who mined the coal from that property? "A. That's right.

"Q. Has the Alva Coal Mine been closed? "A. Yes, it was closed in July of this year.

1407 "Q. Why was it closed? "A. Because it wasn't making any money.

"Q. That's a deep mine? "A. Yes. It's an old mine.

"Q. Is it a mechanical mine or was it a mechanical mine?

"A. Yes.

"Q. Can you recall what extent it had been mechanized? Did it have any continuous miners? "A. No, no continuous miners. The coal seam was irregular. They had several different types of underground equipment.

"Q. Did it have cars pulled by locomotives? "A. I never was underground in the mine, I wouldn't know.

"Q. Was Peabody paying the union scale at that mine?

"A. Yes.

"Q. They were paying Welfare royalties on the coal mine? "A. That's correct."

1408 "Q. Is Peabody Southern Coal Company a wholly owned subsidiary of Peabody Coal Company? "A. It isn't now. There isn't such a thing as Peabody Southern.

"Q. Has it been merged into Peabody Coal Company? "A. It is either that or liquidated, I don't remember which."

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"Q. Mr. Kelce, do you have a contract with Tampa Electric Company? "A. Yes.

"Q. I will ask you if this is a copy of that contract together with a memorandum with respect to certain water transportation companies?

"The Witness: I would have to read the contract to find that out.

"Mr. McRobert:" — attorney for the witness — "As far as you can tell them from superficial examination, is that what it is?

"The Witness: It appears to be."

1409 Mr. Rowntree: We would like to offer this as the next exhibit.

Mr. Kramer: May it please the Court, we object to the introduction of this instrument, it being irrelevant for any purpose in this lawsuit, immaterial, may be prejudicial. It is an instrument dated in November, as I recall it, 1959. Is that not true?

Mr. Rowntree: February.

Mr. Kramer: February 1959. Subsequent to the period involved in the conspiracy. And it is, your Honor, an instrument to which, of course, the United Mine Workers is not a party. We do not think it is relevant for any purpose here. If it is an effort to prove conspiracy, it is by the word or conduct or course of acts of one of the alleged conspirators, and at this time would not be competent for all of which reasons we object, your Honor.

Mr. Rowntree: If your Honor please, it is offered on the question of conspiracy. It is not offered on the question of damages, this particular contract.

There will be proof with respect to this market of coal down in Tampa, Florida. That was the market that
1410 our people supplied when they could get a contract, and there were some 4,000 tons of coal shipped by our client to Tampa Electric Company when they were able to get a contract.

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Now this is a rather involved question with respect to this market. This is a market that has already come up once before with respect to union ownership of stock. There will be proof with respect to West Kentucky Coal Company on this market. In fact, there is already proof in the record that West Kentucky Coal Company had a contract by reason of purchase of Nashville Coal Company, had a contract with Tampa Electric Company to furnish large tonnage to Tampa Electric Company.

There was one question and answer in Mr. Eastin's deposition with respect to that as to why the contract was not fulfilled. Mr. Eastin stated that Tampa Electric Company had cancelled that Nashville Coal Company contract.

We will put into the record subsequently a portion of it, or the record in the case of Tampa Electric v. Nashville Coal Company and West Kentucky Coal Company, which sets forth in the pleadings, both the pleadings, the original complaint and the answer of the company, West Kentucky Coal Company, the reason for the failure to ship coal.

1411 The Court: Is that the reported case?

Mr. Rowntree: That is right, yes, sir. Subsequent to that failure to ship coal to Tampa, a local or a Nashville broker obtained a reduced rail rate from our coal field in this vicinity to ship rail coal to Tampa, since the other contract, the Nashville contract, was not being fulfilled. And having obtained that rail rate, it secured a contract with Tampa Electric Company to ship coal to Tampa from this section.

Our client shipped coal to that market, such quantities as they could obtain contracts for.

The proof will show that Peabody Coal Company shipped coal to Tampa, some several thousand tons, even after the contract is made by Love and Amos, the company that had gotten the rail contract. Subsequently, Peabody Coal Company obtained a very large contract, this contract here, to ship water coal to Tampa.

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It develops in the testimony of Mr. Eastin and in the testimony of the current witness that West Kentucky Coal Company was to have the right to ship half of that Peabody contract.

Now that contract has eliminated the possibility
1412 of shipping the large tonnage from our section here.

It is our contention, too, that West Kentucky Coal Company reneged on the first Tampa contract, on the basis that it had a monopoly on that market. Its purposes in that regard are not known, of course, but one thing that it did was to divert the coal from the Uniontown mine and they dumped it on the Tennessee Valley market in large quantities, and particularly the spot market of TVA. And we say that was a damaging blow to our client.

The Court: The objection to the testimony is overruled.

(Exhibit No. 79 was marked for identification and filed.)

Mr. Combs: May I, if it please the Court? The contract that counsel has reference to was the subject of a Supreme Court decision dated February 27, 1961. The majority opinion was written by Justice Clark.

The sequence of events that counsel was talking about was something like this. A towing company had a contract to deliver a certain amount of coal to the Tampa Electric Company. That towing company was a subsidiary of Nashville Coal Company. After West Kentucky Coal
1413 Company and Nashville Coal Company merged, West Kentucky Coal Company assumed as part of the contract in acquiring Nashville the contract.

After assuming that contract, and after studying
1414 the contract, they have notified Tampa Electric that they would not perform under the contract, because in their opinion the contract was in violation of the anti-trust law. Tampa Electric sued for non-performance, and a declaratory judgment. The District Court held that it was a violation of the Anti-trust Act, and was not enforceable as against West Kentucky.

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The Court: Sixth Circuit affirmed, and a strong minority opinion was written by Judge Weick which was upheld by the Supreme Court.

Mr. Combs: That's right.

Mr. Rowntree: Minority opinion upheld.

The Court: That's right.

Mr. Combs: In the same case, the evidence will show that immediately after West Kentucky had notified Tampa Electric they would not perform under the contract, Tampa Electric looked elsewhere for their coal and made a contract with the Love and Amos people to deliver the coal via the contract. It is in this decision here.

Now this contract — and we might go ahead a little, Your Honor, and say that the Supreme Court reversed both the District Court and the Sixth Circuit and said it was 1415 not in violation of the Anti-trust Act.

As of now, there is some doubt on the status of that contract, because ostensibly when the Supreme Court said it was legal and enforceable, Tampa Electric could still enforce that contract against West Kentucky.

Now this same contract then, counsel is contending is evidence and furtherance of a conspiracy between these parties that has been through this series of litigation. I don't see how it could have anything to do with this case.

Mr. Rowntree: We are not talking about the old contract; we are talking about what has happened since that old contract.

Mr. Combs: You mentioned the Tampa Electric contract, and I was just reciting what the West Kentucky — one of the so-called co-conspirators — what part it had to play in it, and that is the history of that contract that Peabody has now.

The Court: All right, Mr. Rowntree, are you talking about the contract which was contested in the District Court at Nashville on the grounds that it violated the anti-trust laws as amended by the Robinson-Patman Act.

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1416 Mr. Rowntree: We do not —

The Court: And which was appealed to the Sixth Circuit, and wherein Justice Shackelford Miller, writing for the majority of the Court, affirmed the District, but when it reached the Supreme Court of the United States, that Court held that Judge Shackelford Miller was wrong.

Now is that the same contract that you are talking about this minute?

Mr. Rowntree: No, sir, this is a subsequent contract after that one. We do not have anything to do with the legality of that first contract. We have no position one way or another. Of course it is academic to do so, after the Supreme Court has ruled.

But the purposes of West Kentucky Coal Company in reneging on that contract and their subsequent activity with respect to getting back into that market, that it thought it had a monopoly on, when it was learned that a new contract was made with local producers in this section here is what we are talking about, and we have here a situation where Nashville — West Kentucky Coal Company reneged on a market that it thought it had a monopoly on, diverted that coal — why it reneged, we don't know — but it did divert its coal and dumped it on the Tennessee Valley Authority spot coal market.

1417 Mr. Combs: Well, Your Honor, I don't follow counsel. Maybe I am just too stupid, but I don't know.

Now he says that West Kentucky reneged on a contract. Now the only contract I know of West Kentucky having with Tampa Power is the contract that Justice Clark was commenting on.

Mr. Rowntree: That's right.

Mr. Combs: Now that was the contract the Supreme Court says it is enforceable. They didn't want to abide by that contract, and they stated the reason.

Mr. Rowntree: Just as I say, the reason being they thought they had a monopoly on that market. They con-

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tianed to build their transportation facilities on the river, and at Tampa, their loading and unloading. There is testimony already in the record that they continued even after the purchase of Nashville Coal Company, and the guarantee of the old contract by West Kentucky Coal Company, they continued to build their transportation facilities, and when they had got those in shape, they reneged on the contract.

Mr. Combs: For the stated reason, according to the Court, under sworn testimony and witnesses, that 1418 they thought that contract was in violation of the Anti-trust Act.

Now remember this, West Kentucky at no time delivered a pound of coal on that contract, and they haven't to this date. Now why would they form a conspiracy to get a monopoly of the coal and get a contract and then renege? I don't follow counsel's logic.

Mr. Rowntree: I can give a good reason, Your Honor. I can give a good, logical reason.

That is because they thought they did have a monopoly, and they wanted to raise their price down there, and they wanted to use the coal in the meantime to beat this Tennessee Valley Authority down. That is a good logical reason.

Mr. Combs: Talking about logical, it wouldn't be logical, Your Honor, for West Kentucky to state a defense to jeopardize them, perhaps criminally, on the reason they weren't going to comply with the contract and process it through the Courts and two Courts agreed with them, and it is wholly irrelevant, I think.

Mr. Rowntree: I think the evidence will indicate that they had an agreement with Peabody Coal Company to share their contract.

1419 Mr. Combs: I haven't seen any such evidence. I don't know of any such evidence.

The Court: All right, I will let it go into the record.

Mr. Rowntree: This contract dated February 16, 1959, between Tampa Electric Coal Company and Peabody Coal

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Company and River Queen Coal Company is for a term —

I will just paraphrase the contract, Your Honor, or summarize.

Is for a term of twenty years commencing on or about the month of October, 1959. The source of the coal, quoting:

"The coal to be delivered hereunder shall be supplied from the River Queen Mine of River Queen Coal Company, provided that Sellers reserve the right to furnish said coal from any other mine or mines, whether or not owned by Sellers, upon condition that the cost of the coal delivered to Buyer's plant shall be the same delivered cost per million BTU's as if such coal had been delivered from the said River Queen Mine.

"Quantity.

"The base quantity of coal to be supplied by Sellers shall be as follows:

1420	"1959	100,000 tons
	"1960	550,000 tons
	"1961	800,000 tons
	"1962	1,000,000 tons

"1963 through

1979, inclusive 1,250,000 tons each year.

"Delivery.

"The coal to be sold hereunder shall be delivered to Buyer f.o.b. barges at the River Queen Mine dock on the Green River, Kentucky. Subject to the provisions of paragraph 2, Sellers may, at their option, deliver said coal to Buyer f.o.b. barges at any other accessible river dock.

"Quality.

"The coal delivered hereunder shall have an 'as received' average calorific value of at least 12,000 BTU's per pound, determined as provided in paragraph 11 hereof. The size shall be three inches or smaller.

"Base price.

"The Base Price to be paid by Buyer to Sellers for coal hereunder shall be \$3.70 per ton f.o.b. barges at River Queen

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Dock, subject to the provisions of paragraph 2."

1421 There is a provision for base price revision depending upon changes or increases in straight time wage rate per hour and by reason of changes in cost of materials and supplies.

1422 "Q. Mr. Kelce, I ask you, do you recall when the first shipments of coal went to Tampa Electric Company from Peabody Coal Company? Was it before or after the contract was signed? "A. Before the contract was signed.

"Q. Do you recall approximately how much tonnage was shipped before the contract? "A. There was several thousand tons shipped, I don't know exactly the amount.

"Q. Do you recall how many months before the contract, Exhibit 7, those shipments commenced? "A. To the best of my knowledge, six or seven months.

"Q. This memorandum makes reference to certain transportation companies. Does Peabody Coal Company have an interest in certain water transportation companies jointly with Tampa Electric Company? "A. Yes.

1423 "Q. Do you recall what proportion of ownership is shared by those two companies? "A. At the present time it's fifty per cent of it is owned by Peabody Coal Company and fifty per cent by Tampa Electric."

The Court: What is that?

Mr. Rowntree: That is a water transportation company. There are actually two waterborne transportation companies. One of them is river-borne and one of them is ocean or gulf.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. The Virginia and Carolina Chemical Company previously owned one-third?

"A. Well, in the Gulf Transit Company we had no owner-

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ship in it at the beginning. Virginia and Carolina Chemical Company and Tampa Electric Company was sole owners of the Gulf Transit Company.

"Q. What kind of equipment did that company have?

"A. A T-2 tanker, converted tanker.

"Q. Was that a self-loading and unloading vessel? "A. It can load itself and unload itself, yes.

"Q. What is the other company, what's its name? "A. There's a river company, Mid South Towing Company. 1424

"Q. What kind of equipment does it have? "A. It has one tow boat and a number of barges.

"Q. Were these companies organized in order to transport this coal into Tampa, the coal sold on contract, Exhibit No. 79? "A. Yes.

"Q. And the organization of the companies was completed after this contract was made? "A. I think that's correct.

"Q. And the equipment was purchased or acquired by those two companies after this contract? "A. I think that's correct, I am not sure.

"Q. Did Peabody Coal Company lease the loading or transfer facilities of West Kentucky Coal Company below New Orleans?"

1425 "Q. Did Peabody Coal Company lease from West Kentucky Coal Company or firm a subsidiary of West Kentucky Coal Company, loading or transfer facilities on the Mississippi River below New Orleans? "A. It was either with the West Kentucky Coal Company or one of the subsidiaries, I don't remember which. There was a lease made.

"Q. Was that lease made by Peabody in order to handle the coal on this Tampa contract? "A. That and other coal possibly, and other bulk materials.

"Q. Was the lease made after this Tampa contract with Peabody Coal Company, the last exhibit? "A. Well, there

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had been negotiations for quite a little while, I don't know whether it was after or before.

"Q. When did those negotiations commence? "A. On the transfer facilities?

"Q. That's right. "A. I don't remember exactly, but it's been quite sometime ago.

"Q. Was there an agreement between West Kentucky Coal Company and Peabody Coal Company, that West Kentucky coal Company would be used in part to 1426 supply on the Tampa contract? "A. Not exactly, no.

"Q. Would you state what was the arrangement "A. The arrangement that we would take from West Kentucky Coal Company or one of those subsidiaries tonnage equal to half of the Tampa contract.

"Q. Was coal actually shipped from West Kentucky Coal Company on the Tampa contract? "A. No.

"Q. Why not? "A. Because we found it the best interest of both of us to ship it elsewhere.

"Q. And where was that coal shipped then? "A. Memphis.

"Q. Did Peabody Coal Company have a contract to supply coal to the Memphis plant, electric plant? "A. That's right.

"Q. Who owns that plant? "A. Its a municipal plant.

"Q. Do you know what other coal companies had contracts to supply the Memphis plant? "A. There's two other suppliers besides ourselves, West Kentucky Coal Company is one of them, I don't know who the other supplier is. Yes, I do, too, it's Pittsburgh Midway Coal Company."

1427 Mr. Kramer: We haven't specifically objected. The objection may be broad enough to cover it. But, your Honor, they go into the Memphis municipal plant and I do insist on our argument and reasons similar to those heretofore given.

The Court: Same ruling.

(The reading of the deposition was continued.)

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By Mr. Rowntree:

"Q. Did Kirkpatrick Coal Company have a contract with the Memphis plant? "A. He doesn't supply any coal. Now, he may be in on some of those contracts as a jobber."

"Q. Did Peabody Coal Company ship coal to Memphis on its contract to Memphis? "A. Has it shipped coal?

"Q. Yes. "A. I don't remember whether we have or not.

"Q. Is that the contract that West Kentucky Coal Company took over? "A. West Kentucky Coal Company are supply our portion of the contract.

"Q. Does Peabody Coal Company own any stock of Tampa Electric Company? "A. Whether Peabody 1428 Coal Company owns any stock of Tampa Electric Company?

"Q. That's right. "A. The answer is no.

"Q. Have you heard of any one purchasing large blocks of Tampa Electric Company stock in the past two years?

"A. I think it's pretty good stock to buy, but I don't know of anybody buying any large blocks, no.

"Q. Mr. Kelce, do you have any analysis of profit on the coal sold by Peabody Coal Company to Tennessee Valley Authority? "A. No."

The Court: Did he testify there that West Kentucky Coal Company took over Peabody's contract with Tampa Electric Company? Is that what he said? "A. What did he say?

Mr. Rowntree: He said, your Honor, that sometime back there, and he couldn't say when, but some considerable period back, that he started negotiating between Peabody and West Kentucky for the leasing of the loading and unloading facilities on the water from West Kentucky to Peabody.

He states that when the Peabody contract was made 1429 with Tampa, that Peabody Coal Company had the understanding that West Kentucky would ship half the coal to Tampa on that contract.

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Mr. Combs: As I read the question and answer it has to do with shipping coal to Memphis.

The Court: Does it?

Mr. Combs: Yes. The question on the bottom of page -- the question and answer has to do with the Memphis plant.

Mr. Rowntree: I think your Honor was addressing a question to the Tampa Electric Company contract. Is that the contract you were inquiring about?

The Court: I lost the connection, and I heard the witness say West Kentucky Coal Company took over Peabody something.

Mr. Rowntree: The answer to that was:

"The arrangement that we would take from West Kentucky Coal Company or one of those subsidiaries tonnage equal to half of the Tampa contract."

The Court: But he goes on and connects it with Memphis.

Mr. Rowntree: Then he goes into the Memphis situation.

Mr. Combs: Then the answer your Honor heard about West Kentucky shipping part of the contract to Peabody, has to do with the Memphis plant.

1430 Mr. Rowntree: That's right. The actual shipments from West Kentucky are on Peabody's part of the Memphis contract.

The Court: And is Memphis a municipal plant?

Mr. Combs: That is right. That is the testimony here. And the testimony show there are five or six suppliers that are not even named here.

Mr. Robertson: Wait a minute.

The Court: You mean Memphis is in the coal business down there?

Mr. Rowntree: Coal buying business. A municipal plant there. They buy coal to generate electricity in their municipal plant over there.

The Court: I see. All right.

Mr. Rowntree: And Mr. Kelce here says that the coal-- the "West Kentucky coal was diverted from Tampa con-

tract to the Peabody contract to ship it to Memphis because we found it to the best interest of both of us to ship it elsewhere."

Mr. Combs: I don't know where you are reading.

Mr. Rowntree: Top of page 31, second line.

Mr. Kramer: There is a diversion of the witness to show, I think, there was coal shipped to Memphis. We admit that West Kentucky shipped coal to the municipal plant in Memphis, but that is all it amounts to.

1431 Mr. Robertson: Your Honor, the witness testifies otherwise.

Mr. Rowntree: On the Peabody contract?

Mr. Kramer: Yes. Peabody Coal Company had a contract to ship coal to the Memphis plant, and the answer is: That is right.

1432 "Q. Mr. Kelce, do you have any analysis of profit on the coal sold by Peabody Coal Company to Tennessee Valley Authority? "A. No.

"Q. Now — "A. Afraid to look at some of them.

"Q. Peabody Coal Company was awarded a contract to supply coal from properties adjacent to the Paradise site of the new TVA Power Plant being constructed at Paradise, Kentucky; is that correct? "A. That's right.

1433 "Q. When did you first learn about the Paradise Plant being constructed by TVA? "A. When did I learn it was going to be, or they were anticipating it?

"Q. They were anticipating it. "A. After we placed our bid.

"Q. What was the bid that you are referring to there? Was there an invitation for a bid? "A. Invitation, yes.

"Q. Do you recall what the invitation specified in the way of quantity of coal? "A. No, I don't. It mentioned a new generating station.

"Q. Did it specify sixty-five million tons? "A. No.

"Q. Did you have discussions with TVA preliminary to the submission of your bid? "A. No, I didn't.

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"Q. Did anyone of Peabody Coal Company under your authority have such discussions? "A. There was some discussions, I don't know whether they were afterwards or before, I don't remember.

"Q. I notice here, Mr. Kelce, on the bid award of July 27, 1959, that — "A. July 27th?

1434 "Q. 1959, that your Peabody contract for the Shawnee Plant was awarded that day, and also down at the bottom the new plant contract was awarded. Were those two awards at the same time? "A. The two awards, I don't get you.

"Q. Were they made at the same time? "A. Which two awards are you talking about?

"Q. The one down at the bottom here (indicating). "A. Date of award is October 1. Is this the other one you are talking about (indicating)?

"Q. Yes. September 30th, 1959? "A. '59. That was a day apart.

"Q. Were there negotiations between TVA and Peabody Coal Company with respect to this Paradise Plant correct?

"A. After the bid were there negotiations?

"Q. Yes. "A. Yes, sir."

"Q. Do you have a copy of the invitation? "A. Do I have a copy?

"Q. Yes. "A. No. I don't have a copy.

1435 "Q. Will you supply a copy if you can find one?"

"A. I don't see why we wouldn't."

Mr. Rowntree: That invitation is in the file, in the original here. In order to maintain continuity, I would like to retain the right to put that in the connection with the contract when the contract comes in. The contract itself could not be verified until we have the TVA witness on the stand.

The Court: All right.

“Q. Do you know, Mr. Kelce, when you started to acquire the right to mine coal on the properties adjacent to the Paradise site sometime before this contract was made; is that right? “A. Yes; we purchased most of that 1436 property from the Wickliffe Coal Company, twelve or thirteen years ago.

“Q. Twelve or thirteen years ago? “A. Yes.

“Q. Does that property lie immediately south of the plant site? “A. No, it's west of the plant site. Some of it lays south, but the majority lays west.”

“A. I assumed that is what your question was.”

“Q. Mr. Kelce, can you describe the type of equipment that you use for your stripping operation? I understand it's unusual type of equipment. What size shovels do you use? “A. All the way from — for stripping I assume that is what you are talking about?

“Q. Yes, sir. “A. All the way from ten yards to seventy.

“Q. Seventy yards? “A. Yes, that's the largest machinery we are now operating.

1437 “Q. How many tons make up seventy yards?”

Mr. Kramer: Of course, your Honor, we are continuing our objection because this is long subsequent to the period, and the type of operation, the size of equipment this company may be using in the future long after this period we think is immaterial and irrelevant.

The Court: All right. That is along the same line?

Mr. Rowntree: Yes.

The Court: Objection overruled.

(The reading of the deposition continued.) “A. About a hundred five tons.

“Q. And one dipper of that shovel makes seventy-five tons, did you say? “A. About a hundred five tons.

“Q. Does this Paradise plant contract contemplate larger shovels than that? “A. That's correct.

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"Q. Do they make such shovels today? "A. There hasn't been one made, they are making one, we hope it works.

"Q. How big will that one be? "A. Hundred fifteen yards."

1438 Mr. Kramer: Your Honor, we are continuing that objection. They are projecting—they will build a shovel that will handle 115 yards of coal. Why would that be competent for this case?

Of course, we know mechanization is going to improve.

The Court: I will sustain the objection to that last question, what they expect, 115 tons. That might be in the realm of conjecture.

Mr. Rowntree: If your Honor please, we are talking about a specific contract that calls for this shovel to be put in operation to take over the supplying of a TVA plant.

The Court: If you will read the provision of that contract to me.

Mr. Rowntree: That contract was subsequently put into the proof through the TVA witness.

The Court: I will reconsider the ruling, if you will read that to me, if that is in the contract. The basis of the ruling was that it is conjecture. If it is in the contract, they have bound themselves to do it, and that presents another matter.

Mr. Rowntree: This is under Exhibit B, mining operations of the bid submitted by TVA, which became a contract.

1439 "The major equipment contemplated to be necessary for this operation follows:

"1—Marion Type 5960 shovel with 100-yard capacity dipper and 150-foot boom."

It looks like he was off five yards there.

The Court: Fifteen yards.

Mr. Rowntree: Yes, he was off 15 yards. Maybe they changed their mind.

"1—Marion Type 5960 shovel with 65-yard dipper and 220-foot boom."

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"4—Overburden drills of the type of the Bucyrus-Erie 50-R drill.

"4—Drills for the interval between the No. 12 and No. 11 coal of the type of the Bucyrus-Erie 40-R drill.

"2—8-yard long-range shovels for the removal of the parting.

"2—10-yard medium-range shovels for the loading of the coal.

"A sufficient number of haulage trucks of the 100-yard, 80-ton capacity type now offered by several manufacturers, or larger, possibly of 200-ton capacity, if available."

It goes on and describes other equipment. It also involves some underground mining and the use of some continuous miners in the underground mining phase.

1440. Mr. Combs: May I inquire of counsel, your Honor—I don't have a copy of that and I am not too familiar with it: May I inquire of counsel whether or not that TVA required this type of equipment to furnish this coal?

The Court: Yes, sir.

Mr. Rowntree: The TVA required that the bidder submit his equipment that he would use in the operation when he mined the coal that was contracted.

Mr. Kramer: We want to state our objection clearly, your Honor, on this.

This contract, TVA contract, to which this type of equipment is listed as evidentiary of what they would use when they produced the coal under the contract, if awarded, your Honor, was not entered into until the first day of October, 1959. There is no way on earth to say what was anticipated a year before in 1958, nor to say that this was anticipated in connection with a conspiracy.

Here is something that arise in 1959, long afterwards. Not part of any agreement to form a conspiracy. The agreement for the conspiracy must have been in existence prior to December 31, 1958 for it to be a basis for recovery in this lawsuit.

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1441 Your Honor has ruled that subsequent course of conduct is admissible to show that conspiracy existed prior to December 31, 1958.

But, your Honor, here is the TVA calling for bids for a new plant, for a brand new plant that they are going to put into use—a plant which is not yet completed today, the time we are talking to your Honor, and they say that they can prove as a part of an intent, as a part of an agreement, unlawful agreement, what may have been contemplated a year afterwards, looking to something that is to be built some time out yonder in the future.

Now I can't for any reason on earth, your Honor, see how this could be a part of an agreement or evidenced an agreement even of conspiracy that existed prior to December 1958.

In 1959 TVA asks for the first time, your Honor, under this record, for the supply of a certain quantity of coal for a new plant—for the first time, almost a year after the termination of any rights under a conspiracy, to put it the way your Honor has ruled, of any rights under a conspiracy. Now they seek to say that because in 1959 some company, alleged to be a conspirator, said, "We are going to use a certain type of machinery to produce a certain type
1442 of coal", that evidences an intent upon the part of the United Mine Workers or the trustees of the Welfare Fund, back in 1958 and prior thereto, to absorb the coal market.

The Court: I don't understand, Mr. Kramer, that he is offering that testimony for the purposes that you have indicated.

As I understand it, he is offering that testimony to show that the company to which it relates operated with this large machinery, that it was a large company, and that by reason of its large machinery, large tools, it could put out more coal with less manpower; therefore, it could save costs to that extent, and having saved that cost, it was in a position to pay what the cross plaintiff has characterized as

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high wages, union wages, plus what the cross plaintiff has characterized as a high royalty, and that in the light of that situation, since he contends that it bears on those questions, the Court is of the opinion that it is competent.

Has the Court misconstrued the purposes for which you offer this testimony, Mr. Rowntree?

Mr. Rowntree: That is part of it, and also upon this question—not this just alone, but all the proof in the record.

This is offered on the question of dangerous probability of obtaining a monopoly of the TVA market, and we think that this is very strong evidence.

They have taken a 65-million ton contract here, which is considerably over a complete three year supply of TVA coal, and we say that is dangerous probability of obtaining a monopoly on this market. This is a 65-million ton contract, your Honor.

The Court: As I understand, Mr. Kramer is objecting to you introducing testimony pertaining to this mechanical equipment. The Court is undertaking to pass on that objection.

What does the mechanical equipment have to do with the issues in this case, Mr. Rowntree? The Court has undertaken to state that to Mr. Kramer. Is the Court misinterpreting your position about it?

Mr. Rowntree: No, sir, your Honor has stated the specific issue upon which the mechanical equipment bears. The contract as a whole, however, is introduced on this question of dangerous probability.

1444 The Court: The size of it. We went into that question of size and used the grocery store as an analogy, the little grocery store, since it is so small, it couldn't monopolize anything.

Mr. Rowntree: That's correct.

The Court: But the bigger something gets, the bigger it gets, it might be in a position to monopolize or be in a position to attempt to monopolize.

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Mr. Rowntree: That's correct.

Mr. Kramer: Let me say this, Your Honor.

The Court: But I sustain your objection to that testimony about what they propose to do in the 115-ton—

Mr. Rowntree: Shovel.

The Court: shovel, because I think that is getting too far afield.

Mr. Kramer: All of this, Your Honor—

The Court: Off the record.

(Remarks off the record.)

Mr. Kramer: But Your Honor, our objection goes broader; to what Your Honor has just ruled incompetent in this respect. •

Let me state what we have here. Counsel is now offering—they haven't offered the contract itself, but they have offered the exhibit to it as to the type of machinery 1445 which the bidder stated to the Tennessee Valley Authority they would use, if they were awarded the contract.

Now, Your Honor, the contract itself, no bid was called for the contract, this contract, for sale of coal by TVA, and it talks about the sixty-five million tons, that was not in the picture in 1958 or any time prior thereto. Later developments in the industry caused the TVA to decide they wanted to award a large contract, and if they say we want to award a large contract in order to be—that that contract may be fulfilled, we want to know what kind of machinery and equipment you are going to fulfill it with, and thereupon, the bidders submitted the type and kind of equipment they were going to use.

Now, Your Honor, counsel tells Your Honor that this is admissible, because it shows the dangerous possibility of the monopolization of the industry. How in the world, when these things hadn't been thought of so far as anybody within the sound of my voice knows, and I think anybody on earth knows, how anybody could say that a year a half later, because someone or more than that later—no, not

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quite that much later, but October, 1959, ten months later—ten months later, someone comes along and says, "We want a certain type of contract for so many tons of coal."

1446 Now that could not have created within the period of this lawsuit, material to this lawsuit, any fear of monopoly. It had nothing to do with dangerously monopolizing the field—danger of monopolizing the field. It had nothing to do with anything of that sort.

Here is the big machines we say later on, maybe some company is going to use; here is the large amount of coal somebody is going to purchase. That wasn't in the field; that wasn't in the purchasing area; that wasn't a quantity of coal to be monopolized at that time. It is clear outside of the field. It is in the future. It was unthought of in the period here, and how that can be used as a guide to determine whether or not there was an unlawful agreement, the result of which was to create a reasonably-founded fear or likelihood—not fear, reasonably-founded likelihood—of monopolization, when it didn't even exist back in the period here, it might as well have been ten years later.

The Court: Didn't we learn later in our ruling and quotation from 15 Corpus Juris Secundum on a certain section that the Courts permit acts of the alleged conspirators that occurred before the time period of time involving the
1447 conspiracy as well as acts alleged to the conspirators subsequent to the time?

Mr. Kramer: That authority holds—

The Court: If they shed any light on the ultimate issue involved in the lawsuit, namely whether the anti-trust laws were violated, and secondly whether the cross-plaintiff was injured as a result of this?

Mr. Kramer: Your Honor, that authority so holds provided they are within the same range or type of conduct.

This, we say, Your Honor, with all earnestness, is not within the same type of conduct. No conduct for anything like this quantity of coal bids had ever been called or so far as I know, and certainly so far as this record shows. —

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Under that authority—if that be a good authority, and you remember there was a “provided by” in there—but assuming that Your Honor is correct on that, there is no similarity here, the conduct, sixty-five million-ton contract. Oh, no. Nothing to compare with that, that they now seek to put in afterwards, shovels the size of this one. Oh, no. Even half the size of this. I don’t think they got that big. They may have, but not more than half the size of this.

There is no relationship between what happened
1448 before and happened afterward, and I don’t think that 15 Corpus Juris Secundum is the authority.

The Court: The Court is of the opinion that that testimony is competent for whatever bearing it may have, if any—if any—on the ultimate issues involved, namely whether there was a monopoly created by cross-defendants or an attempt to monopolize in which cross defendants participated, and whether or not this cross-plaintiff was damaged as a direct and proximate result of these alleged violations of the anti-trust laws.

Now the Court sustains counsel’s objection to that machinery which related to the future, one item of which dealt with a proposed 115-ton shovel which the party to this contract, Mr. Browntree, expected to construct in the future. The Court holds that that is getting into the realms of uncertainties; it is conjecture; it is problematical; it is too uncertain to go before the jury. Therefore, the objection to that part of the testimony is sustained.

Mr. Rowntree: I think, Your Honor, that we should not put it in on the question of damages.

The Court: The Court has held over and over in this case, at the present time, and will continue to hold
1449 that the testimony that relates to events that occurred before February the 14th, 1954, and testimony that relates to events that occurred subsequent to December the 31st, 1958, may not be considered by the jury as bearing on the question of damages, because only damages that the jury will be allowed to consider is that that resulted

directly and proximately on the alleged violation of the anti-trust laws by the cross-defendant, and which occurred between or from February the 14th, 1954, to and including December 31, 1958.

Mr. Rowntree: I would like permission to introduce this contract, Tennessee Valley Authority and Peabody Coal Company dated October 1, 1959, as the next exhibit, and the Invitation for Bids which were submitted with the deposition of Mr. Kelce as the exhibit after that.

The Court: The Court holds that those exhibits may be received in evidence.

Mr. Kramer: I don't care to reargue the question except to point out to Your Honor that this contract is not yet enforced today under its terms, does not go into force and into effect until such time as the project for which this coal is to be furnished goes into operation, which may be three or four years in the future. It doesn't become 1450 effective until that time.

(Exhibits Nos. 80 and 81 were marked for identification and filed.)

The Court: Mr. Rowntree, what about Mr. Kramer's last observations?

Mr. Rowntree: The contract was a result of invitations put out July 19, 1959, some seven months after our company was put out of business.

Mr. Kramer: We deny that fact, that the company was run out of business. Let's keep the record straight. They ceased to operate as a partnership and started operations as a corporation. We deny they were run out of business.

The Court: Mr. Kramer says this contract purports to go into effect three or four years from now. What about that?

Mr. Rowntree: I think the Paradise plant is pretty well along. It is going to be operating before long, but I can't give you the precise date.

Mr. Kramer: It isn't operating today, counsel will concede?

Deposition of Merle C. Kelce

Mr. Rowntree: I concede that.

Mr. Kramer: The contract doesn't go into effect
1451 until the Paradise plant starts operating.

The Court: Does the contract provided by the TVA to provide coal when the Paradise plant is—

Mr. Rowntree: That's right, Your Honor.

Mr. Kramer: No dispute about that, but it is not to be effective until the Paradise plant is ready to open.

The Court: What about the prospects for the Paradise plant?

Mr. Rowntree: It is well along the way. I'm sorry I don't have a date on that.

The Court: What does the contract say?

Mr. Rowntree: I think it's got a prospective date on it.

The Court: I would like to read that and see.

Mr. Rowntree: If Your Honor please, I might say this, that the contract does require:

"Peabody will proceed with due diligence to install facilities for the orderly mining of coal which can practicably be recovered from this area from strip mining and from high-wall mining."

As the witness states, they have contracted out for the shovels. In other words, there are present obligations arising from the contract to get ready.

1452 Mr. Kramer: It seems that answers Your Honor's question.

The Court: And does Peabody agree to supply to TVA so many tons per year over a period of years?

Mr. Rowntree: Yes, sir. I might read this portion here.

"TVA will use such coal in a power plant with two or more units with a combined capacity of approximately one million two hundred thousand KW which it will proceed with due diligence to construct within the area outlined in blue on Exhibit A.

"TVA's plans call for commercial operation of the first generating unit by October, 1962, and of a second unit by June, 1963.

Deposition of Merle G. Kelce

"Subject to the following provisions, coal shall be furnished at a delivery site of forty thousand tons a week from the first full calendar week in August, 1962, through the last full calendar week of April, 1963, and that a delivery rate of fifty thousand tons a week thereafter until a total of sixty-five million tons has been mined and delivered hereunder."

Mr. Kramer: That is the reason I used the expression "three years", because this is dated in 1959, and the first obligation to furnish, Your Honor, is in 1962. I thought I was correct on that, that is the three-year period I used in my argument to Your Honor.

The Court: I see. All right, the Court holds that is competent for whatever bearing it may have to the issues involved in this case.

1454 (The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Mr. Kelce, did you have any discussions with anyone about producing rail freight rates to eastern plants of the TVA in the past year? "A. No.

"Q. You are familiar with the reduction in rail rate to the Widow's Creek plant? "A. No, I am not.

"Q. Have you submitted any bids contemplating that reduced rate? "A. If there had been I don't know about it.

"Q. Do you handle the submission of bids in your organization? "A. Do I?

"Q. Yes. "A. No."

The Court: Yes, sir.

Over what period was this 65-million tons of coal to be furnished?

Mr. Kramer: It doesn't say the period. It gives minimum monthly deliveries, and says until a total of 65-
1455 million tons have been delivered. The period of time you can calculate, but it doesn't give period of time. Except it says minimum quantities and it varies as between one and two units that are installed.

Deposition of Merle C. Kelce

Mr. Rowntree: That is correct. It isn't spelled out. I don't think the maximum is actually spelled out.

Mr. Robertson: No, it isn't.

Mr. Kramer: The maximum is spelled out and the rate of delivery is spelled out with a beginning date. That is all.

CROSS EXAMINATION

By Mr. Combs:

"Q. Mr. Kelce," ----

Mr. Combs: This is the cross examination without waiving our rights of objection, may it please the Court.

The Court: Yes, sir.

"Q. Mr. Kelce, talking about mechanization, do you know how long Peabody has operated mechanized mines? "A. Mr. Kramer, I was with the Sinclair Coal Company up until July of 1955. I can only speak from 1955.

1456 "Q. When you came with Peabody in '55, were they operating mines largely mechanized? "A. Yes.

"Q. You have been with the coal industry for a good many years, and from general knowledge, can you tell us whether Peabody had been mechanized for many years prior thereto? "A. Yes, they had been.

"Q. I will ask you if Peabody hasn't for something like a quarter of a century been one of the outstanding mines or branches of the mining industry in the mechanization of mines, it has been so recognized in the industry? "A. I think that's true.

"Q. And hasn't Peabody had the reputation even before you came with it, and isn't it true, as a matter of fact, you have tried to keep up with the most modern mechanization process concerning the size of seams geographically, topography at the place where you are operating? "A. We have.

"Q. And you are continuing that policy today by even going into larger mechanized equipment? "A. That's the reason we are developing this hundred fifteen yard shovel.

"Q. Has there, to your knowledge, in recent years, especially since you were connected with Peabody, but even going back years prior thereto, been any change so far as you know of policy with reference to operating the most modern means they can? "A. I didn't understand.

"Q. Has there been any policy— "A. Since I came into the picture?

"Q. Yes. "A. Not that I know of, no.

"Q. You have operated, and you are today, from your general knowledge before you came with Peabody, they have operated largely on the surface or strip mining? "A. The Peabody Coal Company has all been under ground.

"Q. Until when? "A. Until they acquired Sinclair's properties in July, 1955.

"Q. Since then what have you been doing? "A. Most of it is stripping operations.

"Q. Today you have only one deep mine? "A. That's correct.

"Q. Was that deep mine in operation in 1955 and '56?

"A. Yes.

"Q. How about its capital compared with 1955 and 1956 as of today?"

1458 "A. It's producing more coal today per shift than it did in 1955.

"Q. In answer to Mr. Rowntree's questions, you told us something about the more modern mechanization of your strip mines. What about the deep mining in this one mine you still operate? "A. There has been improvements.

"Q. Was it a mechanized mine in '55? "A. Yes.

"Q. Was it at that time what you would consider modernly mechanized? "A. It was a highly modern mechanized mine.

"Q. From your knowledge of that mine and the industry, had it been mechanized for many years? "A. It's

Deposition of Merle C. Kelce

1459 a fairly new mine. It's probably twelve, thirteen years old, but it has been a highly mechanized mine.

"Q. During the twelve or thirteen years of operation has it been a highly mechanized mine? "A. That's correct.

"Q. Why does Peabody go in for mechanization? "A. It's the only way we can live and compete with other fuels.

"Q. Explain what you mean by that, will you, please.

"A. Compete with the gas and oil that we have to compete with in this section of the country.

"Q. What is the effect on cost of operation, and in which phase of the cost of operation does mechanization have in effect? "A. Would you repeat that question?

"Q. Let me get at in a different way? Does modern mechanization either underground or on the surface permit you to operate with less man hours per tonnage than the old methods? "A. Yes.

"Q. Has mechanization improved over the last quarter of a century, that has been true; is that correct? "A. That's correct.

1460 "Q. There has been a gradual reduction in the number of man hours per ton of coal produced as mechanization has increased and improved during the last twenty-five years? "A. Yes.

"Q. What new fuels has coal had to compete with in the last quarter of a century, and I mean by that, what fuels have grown in use as coal had to meet its growth to maintain its market? "A. In the Middle West where we operate, gas mostly.

"Q. In order to compete with gas as a fuel, it's been necessary for you to be able to produce coal at a lower cost?

"A. That's correct.

"Q. Has the production of oil or the use of oil as a fuel had any effect on the amount of coal that is consumed? "A. Yes, to a certain extent. Not as much as gas, however.

"Q. What is the principal market for coal today, what type of industry or use? "A. On our coal it's the Public Utility industry.

Deposition of Merle C. Kelce

"Q. I take it you intended by an answer made earlier this afternoon to a question by Mr. Rowntree to state you did not know just when Peabody entered into its first 1461 collective bargaining agreement with the United Mine Workers of America? "A. You confuse me there; Peabody? See, I was with the Sinclair Coal Company prior to 1955.

"Q. And I understood you told Mr. Rowntree when you came with Peabody in '55, there was already in existence between Peabody and United Mine Workers of America a collective bargaining agreement? "A. That's right.

"Q. When they first entered into a collective bargaining agreement, and by they, I mean, United Mine Workers and Peabody, you do not know? "A. I don't know.

"Q. Since you have been connected with Peabody, Peabody negotiations for the collective bargaining agreement, I understood from your answer awhile ago, was handled largely by a Coal Association which Peabody is a member? "A. That's correct.

"Q. What is the association to which Peabody belongs? "A. There are several of them, Illinois Coal Operators' Association, Ohio Coal Association, Southwestern Coal Association, I think the Kentucky Coal Agency, they call the one in Western Kentucky.

"Q. I take it you companies that belong to these 1462 associations, and for which companies the companies do the negotiating on the bargaining agreement, instruct your negotiators to get the best contract they can out of the United Mine Workers? "A. I am sure that's true.

"Q. At least that's what you want to get? "A. That's what we are supposed to have.

"Q. You have not personally participated in any negotiations? "A. No, I haven't.

"Q. Let's talk a minute about the safety program of the Peabody outfit. What is the attitude of Peabody on safety, safety regulations and statutory requirements with refer-

Deposition of Merle C. Kelce

ence to safety? "A. We have a safety director that is in charge of our safety program in all these coal mines.

"Q. Why? "A. Because it's real important to us.

"Q. Why? "A. To keep our mines as safe as humanly possible.

"Q. Why is it important to keep them that safe? "A. We value a man's life.

"Q. Have you cooperated in any safety programs since you have been connected with Peabody either for the enactment of federal legislation or state legislation in 1463 states in which you function for the purpose of freezing out any little miners? "A. No.

"Q. Small operations? "A. No.

"Q. Have you ever entered into any arrangements of any sort with reference to safety where the objection or purpose of your planning on safety was with the intent or for the purpose of freezing out the little fellow who may be claimed he couldn't pay for such safety? "A. No.

"Q. Has it been your purpose in the mechanization of mines of Peabody since you have been connected with it and further improvement, such mechanization to freeze out the little fellow? "A. No.

"Q. I believe the stock of Peabody is listed on one of the markets, isn't it, one of the stock markets? "A. On the New York Stock Exchange and the Midwest Stock Exchange.

"Q. It's been listed on these exchanges for many years? "A. Well, I can go back to 1955.

"Q. You have got a cut off date for most of these questions, in '55? "A. Yes.

1464 "Q. Mr. Kelce, do you know now approximately how many stockholders there are of Peabody's common stock? "A. Something over ten thousand.

"Q. And, of course, the holdings of various stockholders vary greatly in amounts? "A. Yes, one share up to several hundred thousand.

"Q. You were asked awhile ago about whether or not after Peabody became the owner of the, I believe it's the St. Ellen Mine, there had been any election among the employees of that mine in order to determine whether or not the men employed therein desired the United Mine Workers to represent them as a collective bargaining agent, and I think you said there was no election so far as you know. Do you feel certain there was no election held there? "A. I am not sure. I am not positive.

"Q. You are not positive? "A. No.

"Q. You don't know whether the men had a voluntary election, though, not supervised by or under certification or under notification of the National Labor Relations Board? "A. No.

"Q. You can't say whether it was or wasn't? "A. That's right.

"Q. You do know, however, that Peabody did not
1465 recognize the United Mine Workers of America as a bargaining agent for the men in these two mines that were acquired by peabody in '56 and '57 until after they had received cards indicating a majority of such employees desired U.M.W. to represent them? "A. That's right.

"Q. After that do you know whether any other steps with reference to notice of termination of contract with Progressive Miners had been given pursuant to terms of Progressive Miners' Agreement, collective bargaining agreement prior to entering into the U.M.W. agreement? "A. I don't know.

"Q. You didn't handle the legal phase of that? "A. No.

"Q. I notice some reference to something of that sort in the letters, you did not handle that? "A. No."

REDIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Kelce, this Paradise, T.V.A., contract contemplates the use of one or more continuous mining machines

Deposition of Merle C. Kelce

on the — “A. This will be a strip mine, Mr. Rowntree, we couldn't use continuous mining machines, we use those in the underground.

“Q. As I understand it, the available strip tonnage 1466 was to be supplemented by some underground mining to make up— “A. That's contemplated, yes.”

Mr. Kramer: Our objection continues because we are talking about the same contract.

The Court: That's right.

(The reading of the deposition was continued.)

By Mr. Rowntree:

“Q. In doing that underground mining, it's contemplated the continuous mining machine would be used? “A. Yes, that's our thinking.

“Q. What is a continuous mining machine? “A. Well, on conventional mining, you have a machine that goes into a working face and cuts the coal, cuts the bottom part of the seam, then your drillers, shooters, come in and shoot the coal down, then the third operations is the loading machines come in that loads the coal. Well, that's three separate operations..

1467 “Q. That's also— “A. That's conventional mining, conventional mechanized mining. Now, in continuous mining, the machine goes in and digs the coal off the solid, it isn't necessary to cut it or shoot the coal.

“Q. The machine does all the work? “A. Yes, one machine does the three operations.

“Q. Including the loading? “A. That's right.

“Q. When Peabody Coal Company acquired the properties of Sinclair Mines, Incorporated— “A. You say Sinclair Mines, Incorporated, you mean the Sinclair Properties.

“Q. Properties, yes. Did the stockholders of the Old Sinclair Mines receive stock of Peabody Coal Company in exchange for those properties? “A. Yes.

“Q. And did that stock which represented that exchange

Deposition of R. J. Snider

amount to six million five hundred thousand shares, approximately? "A. That's approximately right, yes.

"Q. Immediately before that transaction, were there approximately eight hundred seventy thousand shares of Peabody outstanding? "A. I have forgotten.

1468 "Q. It was a greatly smaller number of shares outstanding before the transaction? "A. That's correct.

"Q. And the shares the Sinclair Mines stockholders acquired of Peabody Coal Company amounted to several times the number of shares that were outstanding before that transaction? "A. That's correct."

Mr. Rowntree: That concludes that deposition.

We have the deposition of Mr. R. J. Snider, taken the same time and place:

"R. J. SNIDER

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. My name is R. J. Snider.

"Q. Where do you live? "A. I live in Webster Groves, Missouri.

1469 "Q. What is your position, Mr. Snider? "A. I am Vice President of Peabody Coal Company.

"Q. Are you in charge of financial work of this company? "A. Yes.

"Q. How long have you been in that position? "A. I have been in that position since about 1953.

"Q. Mr. Snider, I show you a letter dated—"

Mr. Kramer: Just a moment.

Your Honor, we are going back into a phase of some dealings between this company—the Peabody Coal and this other mining organization, organization of miners, and we object to this and any reference to it.

Deposition of R. J. Snider

Mr. Rowntree: I think we could summarize them, your Honor, maybe—let's see now.

The Court: Are they introduced for the same purposes as the other letters, on the question of notice, that they were claiming to be the representative of the men?

Mr. Rowntree: In this particular instance these are letters terminating—showing a termination of the authority
1470 of a coal association to represent Peabody in signing contracts for Peabody with Progressive Miners.

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

The Court: Mr. Rowntree, I suggest that you pick out paragraphs illustrative of your point.

Mr. Rowntree: Yes, sir.

This letter is from Perry Coal Company, and I think all these companies sent the identical letter pretty much to the coal association that had been representing these companies in dealing with Progressive Mine Workers in collective bargaining, and these letters contain this statement here:

“This letter shall constitute a revocation effective immediately of any authority that the association may have to negotiate on behalf of the company, any extension of
1471 or any changes, additions or amendments to the existing collective bargaining agreement with Progressive Mine Workers of America, District No. 1, which is terminable on or after September 30, 1957.”

The Court: That is the paragraph you want to use in each of the letters and you want to use it for the sole purpose of showing that collective bargaining dealings between the Progressive Union and these companies were terminated?

Mr. Rowntree: That is correct.

The Court: The Court holds that is competent.

Is that all you want to introduce of the letters?

Deposition of R. J. Snider

Mr. Rowntree: That is right.

The Court: Can you gentlemen stipulate on these other letters? If not, I will let him read each paragraph.

Mr. Kramer: I think they all contain a similar paragraph.

I think, for the purpose of the record, we need to get our reason for the objection.

Mr. Combs: The letter in question, your Honor, is a letter addressed by an official of Peabody Coal Company to a coal association that was their bargaining representative 1472 as counsel has stated. It was a notice on the part of the coal company to terminate the authority of that association to bargain with them or anyone.

We object to that type of evidence, because obviously under the law, the operator has a right to choose their collective bargaining agent, and there is no showing and can't be any showing that the union had anything to do with them terminating their bargaining agent.

That is between two separate entities and could not be evidence of any conspiracy against these people.

The Court: All right, I hold that is competent and I will let that be read into the record in the presence of the jury.

Do you want to stipulate right now, in the absence of the jury, so we will know where we are going when jury returns?

Mr. Combs: I suggest, if he has other letters, we may.

The Court: All right.

Mr. Rowntree: The next series of letters is from all this group of little companies and one big company, the 1473 big company and its subsidiaries.

Mr. Kramer: We don't agree to use that language to the jury, but go ahead. We know what you mean.

Mr. Rowntree: These are letters from these companies to Progressive Mine Workers of America, sending copies of this previous series of letters, terminating the bargaining authority of the coal association.

The Court: And you just want to state that to the jury, is that right?

Deposition of R. J. Snider

Mr. Rowntree: That is right.

The Court: The names —

Mr. Combs: Subject to our objection. We merely wish to point out that the case that was involved in this, the court said that they had a legal contract and the company terminated it within its terms. There is no argument about that.

Mr. Rowntree: I don't think there is any argument. It is just preparatory to what happened after that, to focus the matter.

Mr. Combs: My position is just simply this. I wouldn't want the jury to think we had some kind of question about the legality of it.

Mr. Rowntree: I think counsel has a good point there. We don't maintain there is anything wrong.

1474 The Court: That is right. You want to state to the jury the sole purpose, and you don't contend there is anything wrong with these letters.

Mr. Rowntree: About these letters.

The Court: That is right.

.....
(A recess was had, after which the jury returned to the courtroom and the following proceedings were had in the presence of the jury.)

The Court: All right, gentlemen.

Mr. Rowntree: If it please the Court and ladies and gentlemen of the jury, it is stipulated by and between counsel that the two companies which own these two mines, the Millstadt mine and the St. Ellen mine, had used the Coal Producers Association of Illinois to bargain collectively on labor matters for those two mines. And on July 19, 1957, those two companies, subsidiaries of Peabody Coal Company at that time, dispatched letters to the Coal Producers Association of Illinois cancelling their authority to represent these two mines for collective bargaining purposes, and on the same day—

Deposition of Raymond Dupee

The Court: What is the name of the mines again?

1475. Mr. Rowntree: That is the Millstadt mine and the St. Ellen mine.

The Court: St. Ellen?

Mr. Rowntree: St. Ellen, E-l-l-e-n.

And on the same day, July 19, 1957, the two companies dispatched letters to the Progressive Mine Workers of America giving notice of termination of the collective bargaining agreement with respect to these two mines, to be effective September 30, 1957.

It is not the position of either side that there was anything wrong in the dispatching of these letters. This evidence is presented only to clarify the situation with respect to the subsequent testimony.

Is that agreeable?

Mr. Combs: That is agreeable.

Mr. Rowntree: With that, we will turn from Mr. Snider's deposition to the deposition of four individuals who were or had been connected with Progressive Mine Workers of America.

Mr. Combs: May it please the Court, may we have an objection that would run to these depositions, because they are along the same line, and our objection would be on the same line—that is a Labor Board case and is not proper evidence here.

1476. The Court: Yes sir.

Mr. Rowntree: The deposition was taken October 7, 1960 in East St. Louis, Illinois.

• • • • •
"RAYMOND DUPEE
• • • • •

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. State your name, please. "A. Raymond Dupee.
• • • • •

Deposition of Dino Fratiglion

"Q. And in 1957, the early part of the year, were you president of the Progressive Mine Workers of America?

"A. I was.

"Q. How long had you held—did you hold that position?

"A. Two years.

1477 "Q. From what dates? "A. Well, it would be February 1st, that would be in fifty-seven, well, February 1959.

"Q. To February 1, 1959? "A. Yes."

The Court: Is this a deposition you are talking about?

Mr. Rowntree: Yes.

The Court: What is his name?

Mr. Rowntree: Raymond Dupee, D-u-p-e-e. He was president of Progressive Mine Workers of America.

The Court: All right.

Mr. Rowntree: Not at the time of the deposition, however. This was during the time of this incident.

Mr. Combs: And he was not an employee of the company at this time.

The Court: I see.

Mr. Rowntree: At the time of the incident.

Mr. Combs: Yes.

The Court: But he worked for whom?

Mr. Rowntree: He subsequently worked for the Millstadt mine. He had worked for the Millstadt Mine before he became president of the union and he was employed after he was president.

Mr. Combs: I believe, as a matter of clarity, your Honor, that we might point out that he was president of a districtwide—it wasn't a local union at all. It was a national union. And he had been working at this mine before he was elected president, and the company, under a contract or custom, he had a right to return to work after he had served in this office. Just for purposes of clarity, that is what happened.

Mr. Rowntree: That is right.

Deposition of Dino Fratiglion

This is not United Mine Workers of America, this is Progressive Mine Workers we are talking about.

Mr. Combs: Right.

(The reading of the deposition continued.)

"Q. From what dates? "A. Well it would be February 1st, that would be in fifty-seven, well, February 1959.

1479 "Q. To February 1, 1959? "A. Yes.

"Q. And you started as president February 1, 1957? "A. Yes.

"Q. The Progressive Mine Workers of America is a labor union, is that right? "A. That is right.

"Q. And it represents employees that work in coal mines? "A. That is right.

"Q. Where is the union concentrated? Does it have a concentration of membership? "A. Well, it would go down as far as Saline County in Illinois.

"Q. Illinois? "A. Yes, and it would go as far north as around the Peoria District. I don't know.

"Q. Peoria? "A. Yes, up in that territory.

"Q. Is that Illinois also? "A. Yes.

"Q. In 1957, what was the largest mine whose employees were represented by Progressive Mine Workers of America?

"A. Well, I imagine offhand it would have been the St. Ellen Mine over at O'Fallon."

1480 "Q. How old is Progressive Mine Workers of America? "A. Well, it was formed in 1932."

"Q. Did Progressive Mine Workers also represent the employees at the Millstadt Mine? "That is right.

"Q. In 1957, early part of the year? "A. Yes.

"Q. Is that right? "A. Yes.

"Q. Now, did the Progressive Mine Workers have individual locals at each of those two mines, St. Ellen and Millstadt? "A. They did.

"Q. Do you remember the number? "A. Millstadt was 167, and O'Fallon was Number 75.

Deposition of Raymond Dupee

"Q. And O'Fallon is St. Ellen Mine? "A. Yes.

"Q. Did each of those locals have a president and Mine Committee? "A. They did.

1481 "Q. Or Pit Committee? "A. Yes.

"Q. Now, I believe that you are under subpoena here today, is that correct? "A. That is right."

* * * * *

"Mr. Rowntree: Mr. Dupee, when did you first become aware of the drive of the United Mine Workers of America to become the collective bargaining agent of the employees at the two mines we have mentioned? "A. Well, it was sometime in—it was sometime in June, just prior to the vacation period of the miners.

"Q. And how did you become aware of it? "A. You know this all happened three years ago.

"Q. Yes, I understand. If you can't remember, just state. "A. I had several ways I found out about it, by Mr. Winters, superintendent of the coal company at one time at that mine informed me that there would be a drive made by the United Mine Workers on the part of the United Mine Workers, and they would have cooperation from the company in turning that—"

* * *

1482 "Mr. Rowntree: This is the first information that you had on the subject? "A. Yes, I would say so.

"Q. Mr. Winters was connected with which mine? "A. Well, at one time he was connected with the Midwest Mine as a superintendent, but that was before it was taken over by Peabody.

"Q. Is that the Millstadt? "A. And he served there a lot under Peabody too.

"Q. Is that the Millstadt Mine? "A. That is the Millstadt Mine.

"Q. Now, when was the vacation period in 1957 scheduled to be held?"

* * * * *

Deposition of Raymond Dupee

1483 "Q. Mr. Dupee, did you receive a letter from the UMW in July of 1957, in correspondence to this letter here which I show you (indicating)? "A. Yes, I received a copy of that letter.

"Q. I would like to have this entire file marked as Collective Exhibit 1, and I would like to have marked as Exhibit '1-A' the letter dated July 1, 1957, signed by Hugh
1484 White, President, on the letterhead of the United Mine Workers of America, District 12, and addressed to the employees of the Midwest-Radiant Coal Corporation."

Mr. Rowntree: If your Honor please, that letter was brought up in the course of Mr. Lewis' deposition, and the substance of the letter—

Mr. Combs: May I inquire from counsel, isn't that the same letter you introduced a while ago?

Mr. Rowntree: No, this is an entirely different letter.

Mr. Combs: From Hugh White?

Mr. Rowntree: Yes.

1485 Mr. Combs: Of course, we object.

The Court: All right, the Court holds you may introduce it.

1486 Mr. Combs: We reserve our objections and point out that this letter was a letter that was sent to the employees of the two companies involved; it was published in the newspapers; and was subject to radio comment. We don't think it is pertinent here at all.

The Court: All right.

Mr. Rowntree: This paragraph of the letter to the employees of the mines:

"After becoming a member of the United Mine Workers of America and working under the National Bituminous Coal Wage Agreement of 1905, as amended October 1, 1956, they will be eligible to receive all benefits from our Welfare

Deposition of Raymond Dupee

and Retirement Fund which include —" And there the letter sets forth the benefits under the Welfare Fund.

"Q. Mr. Dupee, you did receive a copy of the letter marked Exhibit —"

Mr. Rowntree: The letter just read from —

" (The reading of the deposition was continued.)

1487. "— in the mail?

"A. Yes, sir

"Q. Did you address any letters to the coal companies, Peabody Coal Co., Perry Coal Company, Midwest Radiant Corporation, and Midwest Coal Company? "A. Regarding what?

"Q. Regarding the information that you previously received with respect to the organizing campaign of the UMW? "A. Well, there was several letters sent to the Peabody from my office.

"Q. In what months? "A. Well, there I would have to see. I don't remember the dates."

"Q. Do you have copies of these letters? "A. I don't know."

"Q. Was this after you received information concerning the UMW drive? "A. Yes, it was.

1488 "Q. Did you get replies to those letters? Did you receive replies from the company? "A. No.

"Q. Did you make telephone calls to Peabody Coal Company? "A. Yes, several of them.

"Q. Concerning the same subject matter? "A. Yes.

"Q. Did you talk to anyone at Peabody on the telephone?

"A. No.

"Q. Why not?"

"A. There wasn't anybody available at any time that I called over there."

Deposition of Raymond Dupee

"Q. I'll show you a copy of another letter, and ask you if that is a copy of a letter which you addressed to the company? "A. Yes, sir, that is the letter I sent.

"Q. Do you have the original of that letter? "A. I don't know whether it is on the files of the Progressive
1489 Mine Workers or not."

Mr. Rowntree: To save paperwork, those letters have already been referred to and are the ones which give notice from Progressive to Peabody, and its subsidiaries, that they claim to have the contract to represent the employees at the two mines.

Mr. Kramer: Those are the ones referred to in the Snider testimony a minute ago.

..
"Q. Mr. Dupee, did you receive a reply to this letter of July 4th which is marked Exhibit '1-B'? "A. No.

"Q. Did you later receive in the mail a termination of the contract between Progressive Mine Workers of America which covered the representation of the employees at these mines? "A. Yes."

Mr. Rowntree: There we introduce the letters which we referred to in Mr. Snider's deposition where the cancellation occurred of the Progressive contract effective September 30, 1957.

(The reading of the deposition was continued.)

1490 "A. I received it.

"Q. Do you have the original of that letter? "A. I don't. It may be on the file of the Progressive Mine Workers of America."

..
"Q. Mr. Dupee, before you became president of Progressive Mine Workers, were you an employee at the Millstadt Mine? "A. I was.

"Q. And that is the mine operated by Midwest-Radiant Corporation? "A. I think that is the name.

1491 "Q. And you are presently employed at that same mine? "A. I am.

Deposition of Dino Fratiglioni

"Q. And you are a member of the United Mine Workers of America now? "A. I am."

Mr. Rowntree: The next deposition, page nineteen.

Mr. Combs: This deposition, Your Honor, is on the same subject matter, and we have the same objection.

The Court: All right, same ruling.

"DINO FRATIGLIONI,

"DIRECT EXAMINATION

"Questions by Mr. Rowntree:

"Q. State your name, please. "A. Dino Fratiglioni.

1492 "Q. What is your present position? "A. President of Progressive Mine Workers of America.

"Q. How long have you held that office? "A. A year and a half.

"Q. Do the Progressive Mine Workers of America have an office? "A. Yes, sir.

"Q. Where is it located? "A. Springfield, Illinois.

"Q. And that is your office? "A. That is correct.

"Q. — at the present time? "A. That is right.

"Q. Mr. Fratiglioni, how large a union is Progressive Mine Workers of America? "A. Well, approximately — I wouldn't know offhand. I didn't bring the record with me. I just wouldn't know.

"Q. Approximately. "A. Oh, I would say possibly eighteen hundred working men.

1493 "Q. And what is presently the largest mine that you represent the employees in?

"A. I think the Lumaghi Coal Company, Collinsville, Illinois.

"Q. Approximately how many employees? "A. I would say around two hundred.

Deposition of Dino Fratiglioni

"Q. In 1957, what was the largest mine that Progressive Mine Workers represented? "A. St. Ellen Mine.

"Q. How many employees, approximately did they have?

"A. Approximately three hundred fifty.

"Q. And at that time what was the second largest mine?

"A. Well, I imagine still Lumaghi Coal Company at that time.

"Q. At that time did they have approximately two hundred employees? "A. Well, probably at the time, they had a few more than two hundred employees.

"Q. How long has Progressive Mine Workers been in existence? "A. Since 1932.

"Q. I believe they are concentrated in Illinois? "A. 1494 Mostly, yes.

"Q. Was there any other union in the coal industry to your knowledge, besides Progressive Mine Workers of America and United Mine Workers? "A. No.

"Q. Were you employed in either the Millstadt Mine or the St. Ellen Mine? "A. No.

"Q. Where was your employment in 1957? "A. Lumaghi Coal Company."

1495 "Q. Let me ask you, are you here under subpoena, Mr. Fratiglioni? "A. You 'bettcha.'"

Mr. Combs: May it please the Court. I move to strike this entire deposition. How in the world it could have a bearing on this case, I don't know. It describes the size of it, the size of — I don't see how it —

The Court: If that is all there is to it, just the size, I sustain the objection.

Mr. Combs: That is about all I can see he is asking about, the union.

Mr. Rowntree: We are taking a focus on the Progressive Miners to see who they are, leading up to the dispute which occurs here in these two mines.

The Court: All right.

Deposition of George Schmidt

Mr. Rowntree: We only have two more depositions here which are the depositions we rely on to show the conduct of the company.

The Court: All right, I will let you read it.

Mr. Combs: We will object to the next deposition.

1496 Mr. Rowntree: Next is the deposition of George Schmidt.

"GEORGE SCHMIDT,

"DIRECT EXAMINATION

"Questions by Mr. Rowntree:

"Q. State your name, please? "A. George Schmidt.

1497 "Q. When were you first employed in the St. Ellen Mine? "A. Well, first I was employed at St. Ellen Mine was in '23, 1923.

"Q. And did you leave the mine to go to other employment after that? "A. I left St. Ellen Mine and went to Taylor Mine and worked the Taylor Mine until '31.

"Q. And did you come back to the St. Ellen Mine? "A. I came back to St. Ellen Mine in '31, yes, sir.

"Q. That's the Perry Coal Company Mine at the time you came back to it? "A. That's right.

"Q. Have you worked at the St. Ellen Mine ever since 1931? "A. Up until they closed down, yes.

"Q. At the time the mine closed down, were you a member of the United Mine Workers? "A. Yes, sir.

"Q. And in the early part of 1957, were you a member of Progressive Mine Workers of America? "A. Yes, sir.

"Q. Did you hold any office in the Progressive Mine Workers? "A. Yes.

1498 "Q. What was that? "A. Mine Committee.

"Q. A member of the Mine Committee? "A. Yes, sir.

Deposition of George Schmidt

"Mr. Rowntree: Will you state whether or not the St. Ellen Mine vacation for 1957 was scheduled to be held June 28th, — July 9, 1957? "A. I would think — would think that was it.

* * *

"A. I think that is right, twenty-eighth to the ninth.

"Q. Did the mine, the St. Ellen Mine reopen on July 9, 1957? "A. No, sir."

* * *

"Q. Did you have a meeting of the Mine Committee with anyone on this subject of the reopening of the mine? "A. Yes.

"Q. When was that? "A. Well, that took place I think on about the 17th or 18th of July.

"Q. And where was it held? "A. Held at the office out at the mine.

1499 "Q. Whose office was it? "A. Well, at that time Joe Johnson was my superintendent.

"Q. This was his office? "A. Yes.

"Q. Do you recall who was present at this meeting?

"A. Well, there was the superintendent, Johnson, and Mr. McCollum.

"Q. And the Mine Committee? "A. The Mine Committee and local present.

"Q. What was the number of this local? "A. The number of our local?

"Q. Yes. "A. After we went under the United Mine Workers or before?

"Q. Before. The Progressive Mine Workers. "A. Local 75.

"Q. Number 75 of Progressive Mine Workers? "A. Yes.

"Q. What did Mr. McCollum — did he introduce himself to you? "A. Yes, sir.

"Q. Did he state who he was? "A. He stated he was Vice-President of the Peabody coal Company."

* * *

Deposition of George Schmidt

1500 "Q. Will you please state whether or not Mr. McCollum said anything about —

"Q. —said anything about the mine not having reopened at that time or any reason for it? "A. Well, yes. He said the mine was closed down on account of the State Mine Inspector had the mine closed down on account of bad air.

"Q. Would you state whether or not he said anything about not having advised the men before as to the reason for the closing? "A. Well, when he introduced himself as Vice President of Peabody Coal Company he said he was sorry he hadn't met with us before, and told us the reason why the mine didn't resume operations on the 9th of July, as scheduled. It was due to the fact that it was shut down on account of the State Mine Inspector.

"Q. Did you notice any sign posted with respect to bad air in the mine? "A. No..

"Q. Did Mr. Feist say anything to Mr. McCollum? "A. About the air?

1501 "Q. No, about the mine being down.

"A. Well, if I recollect right, I think he did ask Mr. McCollum if it wasn't true that the mine was shut down on account of what the miners were sent out to join up with the United Mine Workers.

"Q. And can you recall if Mr.—whether or not Mr. McCollum had a letter with him at the mine?

"A. Well, yes, he did. He handed a letter to Feist, Stanley Feist. Stan read it and passed it on to me, and I read it.

"Q. Do you have a copy of that letter? "A. No, I don't.

"Q. Do you recall from whom the letter was sent and to whom it was sent? "A. I don't know to who it was sent, but I know the signature on the letter was from Hugh White, president of the District 12, United Mine Workers.

"Q. Do you recall whether or not the letter was ad-

Deposition of George Schmidt

dressed to Peabody Coal Company? "A. No, sir, I couldn't tell you that.

"Q. What was the substance of this letter? "A. I don't just remember what it was. I can probably remember part of it.

1502 "Q. All right. "A. Peabody was under contract with the United Mine Workers. That's about all. I just can't remember what else was in that letter. If you got the letter, why you read it."

Mr. Rowntree: I showed him the letter previously introduced, previously read, from Mr. White, president of United Mine Workers of America, District 12, to Peabody Coal Company.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. * * * Will you look at that letter, Mr. Schmidt. "A. Yes. To my best ability that reads like the same one I read.

"Q. Reads like the same letter that was at the meeting that Mr. McCollum brought? "A. Yes.

"Mr. Rowntree: Mr. Schmidt, do you recall what Mr. McCollum said after the letter was handed to you and Mr. Feist? "A. Well, as near as I can get to remembering what he said was that Peabody owned and operated twenty-seven other mines outside of the two, the one in O'Fallon and Midwest, and he said most certain that they wouldn't want any trouble at their other twenty-
1503 seven mines by trying to work these two mines.

"Q. Can you think whether or not Mr. McCollum stated the officials of Progressive Mine Workers of America were notified that after the contract expired that was then in effect on September 30th, there would not be another contract signed by Peabody Coal Company with Progressive Mine Workers of America."

Deposition of Frank Kreitner

1504 "A. He did.

"Q. Now, did the Mine Committee report the results of this meeting with Mr. McCollum back to the next meeting of the local? "A. Yes, sir.

"Q. Mr. Schmidt, you came here under subpoena? "A. I did.

"Q. And understood you had to come? "A. I wouldn't have been here if I hadn't."

* * * * *

1505 CROSS EXAMINATION

By Mr. Kramer:

"Q. Did Mr. McCollum tell you at the meeting that the mine would return to work as soon as the bad air was cleared up? "A. Yes, sir. He did on that—that was on the 17th I think when we met with him out there.

"Q. Do you recall when the mine did return to work? "A. Well, I think the 17th was on a Friday and the mine went back to work on a Monday.

"Q. The following Monday? "A. Yes."

* * * * *

Mr. Rowntree: That was St. Ellen Mine. The next deposition pertains to the Millstadt Mine, your Honor.

Mr. Combs: We have the same objection, your Honor, on the same grounds.

The Court: Same ruling.

1506 "FRANK KREITNER,

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. State your name, please. "A. Frank Kreitner.

* * * * *

"Q. Are you presently employed at the Millstadt Mine of Peabody Coal Company? "A. Am I?

Deposition of Frank Kreitner

"Q. Yes. "A. —president there?

1507 "Are you presently employed there? "A. Yes, sir.
Yes, sir.

"Q. And that is the mine that was previously operated by Midwest-Radiant Corporation? "A. Yes, sir.

"Q. How long have you worked at the Millstadt Mine?

"A. Ever since February 5, 1943.

"Q. Are you presently a member of the United Mine Workers of America? "A. Yes, sir.

"Q. Do you hold any office in the United Mine Workers?

"A. No, sir.

"Q. In the period of July through September, 1957, were you a member of Progressive Mine Workers of America?

"A. Yes, sir."

"Mr. Rowntree: Did you hold any office in Progressive Mine Workers? "A. Yes, sir, I was president of the local.

"Q. What was that local number? "A. 167.

"Q. Is that the local for the Millstadt mine? "A. Yes.

1508 "Q. Do you recall whether or not the vacation period for the Millstadt Mine in 1957 was to run from June 28th to July 8th? "A. Well, I don't exactly remember, but I guess that's about it.

"Q. Now, do you recall whether repair work was going on at that mine at that time? "A. Yes. There was some repair work going on at that time.

"Q. Do you recall when the mine was scheduled to go back into operations? "A. You mean after the vacation period was over?

"Q. That's right. "A. I just don't remember what day it was. I know we had just about two weeks vacation, but I don't remember what day it was we were supposed to go back to work. I don't know the day of the month, see.

"Q. Yes. Do you recall if the mine did go back to operating after July? "A. Not the way it was scheduled, no."

Deposition of Frank Kreitner

"Q. State whether or not you received a call from the superintendent of the Millstadt Mine before the mine reopened? "A. Yes, I did.

1509 "Q. And who is that? "A. Fred Schroeder."

"Q. What was the substance of this conversation you had with Mr. Schroeder?"

"A. Well, he told me the mine wasn't going to reopen at this time and I asked him the reason, and I don't remember just exactly what he told me. Anyhow, he told me they wasn't going to work, and then I said, "Well, I have to have some kind of an answer to present to the men," and I said I would get the committee together and we would like to meet them, and he says, "That's okay," he said, "That will be fine. I will have Mr. Hartman out there." So, we went out and saw Mr. Hartman and Schroeder on that day. I forget what date it was.

"Q. That was in between the end of the vacation period and the time the mine reopened? "A. That was about when he called me. I think it was about the last day of the vacation period.

"Q. Now, present at this meeting with you, were, I believe you said, Mr. Hartman? "A. Yes.

"Q. Who is he? "A. He is superintendent of the mine.

1510 "Q. And Mr. Schroeder? "A. He is pit superintendent.

"Q. And your Mine Committee of Progressive Mine Workers local? "A. Yes.

"Q. And you were present as president of the local? "A. Yes.

"Q. Did Mr. Schroeder make any statement at the beginning of this meeting? "A. Yes, he did, but I just couldn't put it that way. It's been so long ago, I just don't remember all he said, but we asked him why the mine wasn't

Deposition of Frank Kreitzer

opening and I forget just how he put it. No, he said,—he said the reason they wasn't opening, he said they couldn't work two mines and shut down twenty-seven

"Q. Now, did you ask Mr. Hartman about this? Did you address a question to Mr. Hartman? "A. Yes. I asked Mr. Hartman, I said, "I understand the mine wasn't going back to work unless we join the United Mine Workers."

"Q. What did Mr. Hartman say? "A. He said he wouldn't comment on that.

"Q. Did you make a statement to Mr. Hartman at 1511 that point? "A. Well, yes. I did, I said, 'Well, when we left here we left the Progressive Miners, and that's the way we intend to come back.'

"Q. What did Mr. Hartman reply to that?

"Q. You said you intended to come back as Progressive Mine Workers. What did Mr. Hartman say to that? "A. Well, he said,—I don't know just how he put it.

"Q. State whether or not he said the majority rules, and they might make the mines united? "A. Yes, that's it.

"Q. When did the Progressive Workers contract for the Millstadt Mine terminate? "A. I think it was about the first of October.

"Q. At this meeting that we have been talking about, did Mr. Hartman have a letter with him? "A. Yes sir.

1512 "Q. Did he read that letter at the meeting? "A. Yes, sir.

"Q. Do you recall the substance of the letter? "A. Well, I just can't remember just what it said, but he did say all the mines Peabody acquired would be under the United Mine Workers, they had a contract to that effect.

"Q. Was this a letter from the United Mine Workers? "A. I don't know where it was from. Hartman had the letter there in the office that he showed us.

"Q. I will show you a copy of a letter—"

Interrogatories Propounded to J. L. Hamilton

Mr. Rowntree: That is, the same letter as before, United Mine Workers to Peabody Coal Company.

(The reading of the deposition continued.)

"A. You want me to look at that?

"Q. Yes, sir. "A. Yes, I think that's the one. It reads about the same as the one he had out there.

"Q. Now, did Mr. Hartman say anything after he read this letter at this meeting? "A. Well, he said—I think he said, 'That's the way it is boys,' or something in that order. Something on that order, he said, 'That's the way it is,' or I forget just exactly what he said.

1513 "Q. Now, was the result of this meeting we have been talking about reported to the local union meeting of your local? "A. That's right.

"Q. Following this meeting? "A. Yes, sir.

"Q. Do you recall whether or not a substantial amount of members of the local were present at that meeting? "A. The biggest part of them."

"Q. Did the Millstadt Mine reopen July 20th or do you recall the date? "A. Well, somewhere right around
1514 there. I just don't exactly know for sure. Seems to me it was about the twentieth.

"Q. What day of the week was it? "A. Well, it was on a Saturday.

"Q. Did the overburden crew work on Sunday? "A. Yes.

"Q. Were the men paid straight time on those two days? "A. No, we get time and a half for Saturday and double time for Sunday.

"Q. And the mine had been closed the week days preceeding that? "A. Yes."

J. L. HAMILTON

Mr. Rowntree: The interrogatories propounded to Mr. J. L. Hamilton, executive vice president of Island Creek Coal Company.

Interrogatories Propounded to J. L. Hamilton

1515 Mr. Rowntree: "Question: Where do you reside and what is the distance of your residence from Knoxville, Tennessee?

"Answer: I reside at 1511 Enslow Boulevard, Huntington, West Virginia, which is approximately 185 air miles from Knoxville, Tennessee.

"Question: What is your official position with Island Creek Coal Company and what are your duties in that position?

"Answer: I am the Executive Vice President of the Company and its subsidiaries. I am second in command of the Company, directing all its affairs subject to the President.

1516 "Question: Has any analysis been made of profit made by Island Creek Coal Company on coal shipped to Tennessee Valley Authority and, if so, kindly file as collective Exhibit 2 to these interrogatories a copy of such analysis?

"Answer: No.

"Question: Does the Island Creek Coal Company have a contract with the United Mine Workers of America, and, if so, is this the so-called 'National Bituminous Coal Wage Agreement of 1950', as amended?

"Answer: Yes."

We would like to read extracts from the statement which was filed.

Mr. Kramer: This is another one of these 1960 statements, your Honor, taken from Moody's Industrial Manual, and for the reasons heretofore given with reference to others, we object.

The Court: Same ruling.

Mr. Rowntree: "Incorporated in Maine September 30, 1910, and acquired the property and assets of United States Coal & Oil Co.

1517 "In 1923, 5,500 acres of coal lands in Logan and Mingo Counties, W. Va., were leased for a period of

Interrogatories Propounded to J. L. Hamilton

50 years with the privilege or renewing for a further period of 50 years. This acreage added 50,000,000 tons to the coal reserves of the company. In 1926 sold Island Creek Railroad to Chesapeake & Ohio Railway Co. . . ."

"On Dec. 27, 1941, acquired 97.06% of capital stock of United Thacker Coal Co. which owns coal lands adjacent to company's properties in West Virginia. During 1942 company increased holdings to 99.97%."

1518 "In November, 1954, company acquired coal sales division and lake docks at Duluth, Minnesota, and Port Huron, Michigan, from Cleveland-Cliffs Iron Company.

"As of August 31, 1955, merged Pond Creek Pocahontas Company."

"As of January 1, 1956, acquired principal assets of Red Jacket Coal Corporation from W. M. Ritter Lumber Company for one million dollars cash and two hundred and fifty thousand common shares."

Tonnage, 1950	— 7,363,438
1951	— 9,002,623
1952	— 6,733,658
1953	— 6,364,299
1954	— 5,699,879
1955	— 10,881,786
1956	— 15,257,543
1957	— 14,504,061
1958	— 10,758,102

"Upon completion of Pond Creek merger in 1955, company and subsidiaries owned in fee or mineral interests, about ninety-six thousand acres of coal lands in Logan, McDowell, and Brooks Counties, West Virginia; Washington County, Pennsylvania; and Breathitt and Magonoff Counties, Kentucky; and held under lease about fifty thousand five hundred acres of coal lands

Interrogatories Propounded to H. D. Waters

in Logan, Mingo, McDowell and Wyoming Counties, West Virginia; and Breathitt, Knott, and Magoffin Counties, Kentucky.

"At that time company operated or held fifteen mines fully equipped and with accessory plant and employee facilities capable of producing twelve million tons per year.

"Since that time company has acquired leaseholds of Red Jacket Coal Corporation in Mingo, Wyoming, and Logan Counties, West Virginia, and Buchanan County, Virginia, with seven operating mines. Assigned and unassigned reserves so acquired at time of acquisition were estimated well over fifty million tons.

"Company also acquired, since 1955 Pond Creek merger, leaseholds of Algoma Coal and Coke Company in McDowell and Wyoming Counties, West Virginia, with one operating mine. Estimated reserves at the time of acquisition were seven million five hundred thousand tons."

It goes into the reserves in 1959, but I guess that is a little questionable on that.

We go to interrogatories of Duke Power Company. I might say the Duke Power Company was one of the 1520 customers of the defendant and cross-plaintiff, Phillips Brothers Coal Company.

H. D. WATERS

Mr. Rowntree: Interrogatories propounded to Mr. H. D. Waters.

1521 "Question: What is your official position with Duke Power Company?

"Answer: Manager Fuel Purchases.

1523 Mr. Kramer: All of these Moody's, your Honor, he has read. 1958, 1959 and 1960.

Go ahead. You have a right to read it the way you want to, I guess.

Mr. Rowntree: That is what I was thinking.

Interrogatories Propounded to H. D. Waters

This is a purchaser of coal here. You saw the producers. This is the purchaser.

"Stonega Coal & Coke Co., 552,359; Clinchfield-Pittston Co., 361,003; Island Creek Coal Co., 353,844, Pocahontas Fuel Company, 265,266"—Pocahontas is the company that merged into Consolidation — "Guyan Eagle Coal Co., 241,281."

1957. "Stonega Coal & Coke Co., 445,985; Clinchfield-Pittston Co., 208,649; Island Creek Coal Company, 218,509; Guyan Eagle Coal Company, 279,593; Wise Coal & Coke Company, 306,291."

1958. "Clinchfield-Pittston Company, 256,711; Island Creek Coal Company, 182,250; Guyan Eagle Coal Company, 185,325; Wise Coal & Coke Company, 229,892; Virginia Iron, Coal & Coke Company, 191,674."

That is all.

1524 Mr. Kramer: Now, Your Honor, I want to read this same testimony of this Interrogatory No. 3, reading across, as they have read, as to the production.

Stonega Coal & Coke Company, 1956, 552,359 — this is tonnage. 1957, 445,985; 1958, none at all.

Clinchfield-Pittston Company, one of the union companies: 1956, 361,003; 1957, 208,649; 1958, 256,711.

Island Creek Coal Company:—another one of the union companies—1956, 353,844 tons; 1957, 218,509; 1958, 182,250.

Pocahontas Fuel Company: 1956, 265,266; 1957, none; 1958, none.

The Guyan Eagle Coal Company:—this is the first time this one has been in the record, your Honor—1956, 241,281; 1957, 279,593, 1958, 185,325.

The Wise Coal & Coke Company: 1956, none; 1957, 306,291; 1958, 229,892.

The Virginia Iron, Coal & Coke Company: 1956, none; 1957, none, 1958, 191,674.

These last two, the Wise and Virginia companies, are

Interrogatories Propounded to H. D. Waters

not operating under collective bargaining agreements, your Honor.

The Court: All right.

1525 Mr. Kramer: Yes, we want to read the cross interrogatories your Honor.

Mr. Kramer: "Will you kindly state the total number of coal producing companies who ship coal to Duke Power Company during each of the years 1956 to 1960?—we will limit it to 1958 under this record—"and indicate whether such number included small as well as large producers, and also indicate all of the coal producing states which were the source from which such total number of coal suppliers produced the coal you purchased?"

Answer: "1956, 130 producers; 1957, 113 producers; 1958, 146 producers. . . . During each year above coal originated in West Virginia, Virginia, Tennessee and Eastern Kentucky."

No. 2: "During the period 1956 to 1960 were your coal purchases on a spot market basis rather than an annual or longer term contract basis?"

Answer: "1956, Annual Contract; also spot basis. 1957, Annual Contract; also spot basis. 1958, spot basis only."

No. 3: "If your purchases during the period 1956
1526 to 1960 were made on the bases of spot market purchases and also on annual or longer term basis, please state the approximate percentage of purchases which were made on each basis."

Answer: "1956, 35% Spot; 65% Contract. 1957, 37% Spot; 63% Contract. 1958, 100% Spot basis."

Cross Interrogatory No. 4: "Please explain your purchasing policy and practice as to your spot market purchases of coal, including a statement as to how your purchase price is determined."

Answer: "We purchase our coal on the basis of com-

Deposition of Michael F. Widman, Jr.

petitive bidding. Our general specifications are: 5% maximum moisture, 10% maximum ash, 13,000 minimum BTU per pound. While we do not adhere strictly to these limits, our average heat value for the coal that we burn is usually at 13,000 BTU or possibly a little better.

"Each month we receive from eighty to one hundred twenty-five quotations. These are tabulated to show supplier, type of coal, tonnage, mine price per ton, freight rate per ton, delivered price per ton, cost per million BTU, percentage of moisture ash and BTU per pound.

"In this manner we are able to evaluate all coals on a cost per million BTU basis, which equalizes the heat value per pound of coal."

1528 (The deposition was read by Mr. Rowntree and Mr. Robertson.)

"MICHAEL F. WIDMAN, JR.

was called as a witness, and having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name? "A. Michael F. Widman.

"Q. Where do you reside? "A. I reside in Montgomery County, Maryland."

"Q. What is your position in United Mine Workers of America? "A. Assistant to the President.

1529 "Q. How long have you held that position? "A. Since April, 1957.

"Q. Did you have any connection with the United Mine Workers of America before that time? "A. Yes, sir, as a representative."

"Q. How long were you a representative? "A. Well, I have been a representative of districts off and on, and

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away from it maintaining, of course, close relationships while I was with other organizations in the thirties.

But I have been working for the labor movement generally as a Mine Workers representative since April 1, 1929.

"Q. Mr. Widman, you are the Assistant to the President of the International Union? "A. That is right, sir.

1530 "Q. What are your duties in that position, generally speaking? "A. Well, there is no job description in connection with my assignment. I do some liaison work between the various districts and our own organization. I do some research work and this is primarily research at the moment.

"Q. Were you in some other field primarily before the research became your primary activity? "A. Yes. I was pretty much since 1950 been assigned to the organizing committee of the International Executive Board for liaison work between the districts and the National Union, particularly in northern West Virginia and central Pennsylvania in those years.

"Q. Mr. Widman, about March 21, 1958, did you attend the meeting with the three directors of the Tennessee Valley Authority in Knoxville, Tennessee? "A. Yes.

"Q. Who invited you to attend the meeting? "A.
1531 One of two people and I am not sure which one. It was either Mr. Bayfield of American Coal Sales or Mr. Moody of the Southern Coal Producers, I believe is the organization he represents. It was one of the two of them. I just don't recall which.

"Q. Is Mr. Moody President of Southern Coal Producers Association? "A. He was at that time.

"Q. That is Mr. Joe E. Moody? "A. I think it is Joe E. We call him Joe, I don't know about that initial.

"Q. Who else attended that meeting, if you recall? "A. Well, I would say there were about twenty people in the meeting, roughly, representing operators, and the TVA.

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There were not just the three directors, there were others there. I don't recall all their names.

"Q. Was Mr. Moody there? "A. Oh, yes.

"Q. Was Mr. Bayfield there? "A. Yes.

"Q. Was Mr. B. C. Smith of Intermountain Coals, Inc., there? "A. Coals? If you mean Pat Smith, I don't know by that initial he was there. There was a Smith by the name of 'Pat'.

1532 "Q. Can you state the purpose of that meeting?

"A. Well, I was in pretty much of a position of a listener. I had never met with TVA before that time. I have yet to know just what the purpose of the meeting was. There was no definite designation to me of any specific purpose. But there was considerable complaints aired, one in, one in particular was the practices of TVA.

Most of the time was devoted to that problem, that is the cancellation of delivery on the part of TVA on a coal allocated in a bidding system. That was the biggest complaint. Most of the time was spent on that.

I didn't speak on it. I merely made a few remarks at the end of the meeting. As I said, I considered myself a listener and I was listening.

"Q. Are you familiar with the difference between term contract coal awards of TVA and spot, so called spot coal awards? "A. I think I am fairly familiar with it.

"Q. Was the matter of the amount of coal bought by TVA on spot coal awards discussed at this meeting? "A. Only on this basis, as I recall it, it has been over two years ago. That spot bidding was advertised weekly or semi-monthly. I am not too sure just which. I think it was weekly. When these bids then were, well, I guess you would call awarded to the various groups, they were
1533 sometimes reduced from the award granted.

In other words, the tonnage received. That is where they were complaining more on that phase of it than anything else. The term contracts, I don't think, entered the picture very much.

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"Q. Was the discussion along that line that the spot coal award should be in larger amount? "A. No. TVA coal—the statement that there, as a matter of position as I recall it, they wanted the major portion of their coal to be term coal rather than spot coal. Spot coal was intended to fill in the gap, as they said, I think up to, I think they talked about twenty per cent.

"Q. Was there a general expression of opinion at the meeting that the spot coal was in too great a quantity to serve the purpose of filling in gaps? "A. I didn't gather that from the conversation that went on.

"Q. Did you state just now that the principal discussion at the meeting involved the matter of TVA sticking to bidding for coal? "A. Not, of course, TVA does have the bidding procedure on a competitive basis. There was no complaint that I heard of in this conference of the method of the bidding so far as bidding is concerned. If you
1534 mean the rules of the game or anything like that, there was nothing said there about that.

"Q. Just what was the purpose of this meeting? "A. The purpose of this meeting was complaints on the part of the operators, there were a number of them originally met the night before the meeting with TVA. There, I wouldn't venture a guess on how many were there. But there were operators from all over the area. During the meeting they were all airing their problem. It all went back to this uncertainty after bid award of the possibility of fulfilling at that price. That seemed to be the big problem that they were trying to get TVA, if you bid five thousand tons and awarded to this fellow, they wanted delivered five thousand tons. There were many of them in the crowd, I think one of them had a thousand ton award.

I believe one was less. I don't remember. I knew it was under a thousand, I thought it was quite small, that complained for the very same reason that he tried to get this coal in there at that price, then they cut him off before

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they took delivery. That is all I heard about it is what they had to say.

As far as their case is concerned, I couldn't verify it.

"Q. You mean the main purpose of the meeting then was to discuss the matter of TVA cancelling all or portions of contracts after award? "A. Whether that was the main purpose of the meeting, I don't know. I know that was the main part of the discussion at the meeting.

"Q. Do you know if a memorandum was distributed to those participating in the meeting concerning the subjects to be brought up at the meeting? "A. I don't recall them right now.

"Q. Did you make any memoranda as to what happened at the meeting? "A. No; it was not my meeting. As I said, I was pretty much an observer. I usually don't pay too much attention to taking a memorandum.

If I call a meeting or am one of the principals of setting it up, then I do.

"Q. Isn't it a fact, Mr. Widman, that contracts awarded by TVA are firm contracts and TVA has no power to cancel them?

You say TVA has been cancelling contracts after award?

"A. I am merely repeating what I heard discussed at the conference.

"Q. You say that is all you heard discussed? "A. That was the principal part of the discussion. They talked about the future of TVA, how much coal it was going to burn, so on, so forth. But the principal discussion was this, the operators, both as represented particularly by Bill Bayfield, in the sales section, were complaining bitterly of the treatment they got on these spot bids in particular.

There didn't seem to be too much argument on term contracts. There was some, but it was very, very spotty.

"Q. Most of the objection was based on spot coal con-

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tracts; is that correct? "A. On concerning spots, not on spot coal contracts as such, but concerning this, well, let's say, unevenness in acceptance after bid allowance or bid award.

"That was the principal squabble they were having in the thing.

1537 "Q. What do you mean by acceptance, in that answer? "A. This is, as I understand it, I don't know whether it is the terminology that might be understood by others. Say they were awarded a bid for 'X' cents per million BTU. Before they got that delivered, TVA would cancel part of that on this basis now. Now we are going to take this coal probably after a while but if you want us to take it this next week, our bids are lower. This is sometimes following. That was the big beef down there.

"In other words, they were trying to make a going market price when it was lower on coal already awarded, probably not delivered for some reason or another, delays over which neither side had control, as I understand the explanations made.

"Q. Is your general indication of those participating in the meeting that the TVA price was too low? "A. Oh, I think that was in all sections of it, there was some complaint of the price being so low that Walsh-Healey Wage Schedules were not even met, could not be met by the prices.

"Q. That matter was discussed? "A. Briefly. I think I raised that question at the end of the meeting and it didn't take but about five minutes at the end of the meeting for me to raise the question.

1538 "Q. Are you the only one that discussed that matter? "A. I was the only one I think.

"Q. What about some of the others? Did they talk about the ability to make a profit at the TVA price? "A. Oh, yes, passively. There was a remark made by one or two on the subcommittee on that question. They talked about affording them an opportunity to mechanize their

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mines. They couldn't do it on the price because TVA was suggesting some mechanization as a source of meeting the competitive price they were awarding contracts.

"That discussion was not very long, either.

"Q. Which committee are you referring to there? "A. Well, both sides, TVA and the operators in the group. There were about, I think, six or eight.

1540 "Q. Mr. Widman, United Mine Workers of America, International Union and the District Unions enter into so-called 'sweetheart' contracts; is that not right?

"A. I know of no such sweetheart contracts. What do you mean by sweetheart contracts?

"Q. I suppose it is what the newspapers refer to, which is an agreement between an operating company and the union that the operator will pay a scale less than that contained in the National Bituminous Coal Wage Agreement?

"A. There is only one contract in our industry recognized by our union, only one official United Mine Workers contract. I think that is a matter of public record. It is not hard to find. That is it. That sets out the only wage scale we have.

"Q. Is that true since the 1958 Amendment? "A. That has been true throughout the life of our industry, with this exception. In the early days, in the thirties, we had differentials of agreements. For instance, the north and south day wage scale. But all of those, during the thirties, were changed to make them uniform. In other words, a mule driver in our early agreements would get probably a dollar or dollar and a half day less than some of the well,
1541 say, states like Alabama and Tennessee, than they did in the north in those days, but the operators and mine workers got together and made one uniform agreement in the industry.

"They cut out all these little subdistrict agreements or disagreements that were provided for during the days of the central competitive field negotiations.

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"Q. Has the increase in wage under the National Bituminous Coal Wage Agreement of 1950 as amended from time to time in later years been on a uniform basis throughout the country? "A. I think it is uniform with probably a historic differential of some new job that may have come in. For instance, with the job evaluation made jointly in that district, there may be a few cents variance there. I don't recall of any specifics because we have been trying to make them all uniform.

"Q. Have you succeeded? "A. I think we have.

"I know of none personally that are different now."

1542 "Q. Has any operator told the Union that it could not afford to pay the union scale? "A. Not to my knowledge. Of course, I do not negotiate the contracts.

"Q. But you have been in organizing work? "A. Oh, yes.

"Q. You say that no coal operator has told the Union or the organizing representatives that he could not afford to pay the union scale? "A. From time to time, I think that has been a position taken by the industry over a course of years in national negotiations.

"Q. I am talking about individual operators recognizing the fact that operators differ as to their cost factor, so far as labor is concerned? "A. I know of no specific case.

1543 (The following deposition was read by Mr. Rowntree and Mr. Robertson.)

"ELMER C. HILL

a witness called at the instance of the defendants and cross plaintiffs.

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. Elmer C. Hill.

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"Q. What is your occupation, Mr. Hill? "A. My title is Chief, Coal Procurement Branch, Division of Materials, TVA.

"Q. Your office is located in Chattanooga, Tennessee? "A. That is correct.

"Q. How long have you held that position? "A. I have held this specific position for — well, since September of '56.

"Q. Can you tell us briefly what your job consists of? "A. I say officially that my position consists of directing the administration of the policies and procedures employed by TVA in securing its coal requirements.

"Q. Do you have anything to do with the actual procurement of coal? "A. Well, I direct the procurement of coal."

Mr. Rowntree: At that point we introduced the coal awards of TVA. This was entered pursuant to a stipulation which I should read:

"Mr. Rowntree: Let it be stipulated by and between counsel that Exhibit 1A through 1J are true copies of the lists of coal contract awards by TVA for the period February 1, 1954 through approximately September, 1960."

"Is that stipulation agreeable with you?"

Mr. Kramer: I would like to state that the stipulation should go further and specify that these various exhibits or pages contain the information as shown in the headings of the different columns listed thereon.

1545 Mr. Rowntree: That's all right with us.

Mr. Rowntree: We will offer as next exhibit Term Contract Awards, being Exhibit 1-A to the deposition.

(Exhibit No. 82 was marked for identification and filed.)

Mr. Rowntree: Offer as next exhibit Spot Coal Awards, Shawnee and other plants, November, 1952, through June, 1957, being Exhibit 1-B to the deposition.

(Exhibit No. 83 was marked for identification and filed.)

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Mr. Rowntree: Eighty-three.

We offer as Exhibit 84, Spot Coal Awards, Shawnee and other plants, July, 1957, through December, 1959, being Exhibit 1-C to the deposition.

Mr. Kramer: Your Honor, we object to this exhibit insofar as it goes beyond December 31, 1958, for the reasons which have been given to Your Honor. We do not offer objections through December 31, 1958.

1546 The Court: Objection overruled.

(Exhibit No. 84 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 85 Spot Coal Awards, Shawnee and other plants, January, 1960, through September 1960.

Mr. Kramer: And the same objection with reference to the relevancy on account of the date, Your Honor.

The Court: Same ruling.

(Exhibit No. 85 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 86, Spot Coal Awards, August, 1952, through June, 1957, being Exhibit 1-E to the deposition.

(Exhibit No. 86 was marked for identification and filed.)

1547 Mr. Kramer: Isn't that limited to a particular plant?

Mr. Rowntree: That is for Kingston and other plants.

We offer as Exhibit 87, Spot Coal Awards, for Kingston and one other plant, for July, 1957, through December, 1959, being Exhibit 1-F to the deposition.

Mr. Kramer: To the portion of this tendered exhibit subsequent to December 31, 1958, the same objections and for the same reasons.

The Court: Overrule.

(Exhibit No. 87, was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 88, Spot Coal Awards, Kingston and one other plant, for the period January, 1960,

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through September, 1960, being Exhibit 1-G to the deposition.

Mr. Kramer: This again, Your Honor, is a period subsequent — it is all 1960, and the same objection for the same reason.

The Court: Same ruling.

(Exhibit No. 88 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 89 Spot Coal 1548 Awards for John Sevier Plant, March, 1955, through June, 1956, being Exhibit 1-H to the deposition.

(Exhibit No. 89 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 90, Spot Coal Awards for Widow's Creek Steam Plant, August, 1952, through April, 1956, being Exhibit 1-I to the deposition.

(Exhibit No. 90 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 91, Spot Coal Awards for Wilson Steam Plant, November, 1952, through January, 1956, being Exhibit 1-J to the deposition.

(Exhibit No. 91 was marked for identification and filed.)

1549 "Q. Mr. Hill, state whether or not these awards made in Exhibit 1-A through 1-J represent the awards made by TVA as a result of bidding and whether they show the name of the seller to whom was awarded the coal contract by the Tennessee Valley Authority. "A. Hold it just a minute."

1550

"A. Well, to answer your question, the tabulations of the awards that we loaned you are true copies of the awards that TVA has made since the period you indicated. Most of these awards were made as a result of competitive bidding, but there were a few awards during the period about 1956 which were made under emergency conditions and those few awards were negotiated purchases.

"Q. Do these lists in this exhibit correctly list the cost of the coal delivered at the plant mentioned in the award

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according to cost per million BTU? "A. Yes, those tabulations do list the cost of the coal according to BTU's.

"Q. Will you state whether or not these computations of costs were made by TVA in the ordinary course of business with a view to determining the cost represented by each bid and each contract that was awarded? "A. That is correct.

"Q. What are the principal factors in determining the cost of the coal to TVA? "A. The destination price per ton and the quality of the coal.

"Q. By 'destination price', does that mean the quoted price per ton of the bidder, excluding transportation cost?

A. Well, some coal is bought on a destination price basis, particularly truck coal, in that we are offered only one price, period, and that is the price we pay for the coal if we buy it, but other coal is bought on an origin price basis, such as f. o. b. rail cars and then we are responsible for the transportation cost.

"Q. So the cost shown on these exhibits would include the transportation cost where the TVA pays the transportation costs? "A. I believe most of these tabulations indicate only the BTU cost of the coal to TVA, which would be a destination cost.

"Q. Well, the cost of getting the coal to TVA is included in your BTU cost? In other words, I am trying to find out whether or not the BTU cost there includes all of the transportation cost to TVA. "A. Yes, it does. Now, to answer your question here, some of these tabulations do show a mine price as well as the transportation cost if one is separate, but the spot awards, I believe, only list the destination and BTU cost, they don't show a separation.

1552 "Q. They do not show a separation of transportation cost from the cost at the mine but they are figured in together, is that correct? "A. As far as the tabulations are concerned in connection with the spot awards, I don't believe they show a mine or transportation cost but they do show a destination cost per million BTU, which includes any transportation that would be involved in getting

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the coal to the particular destination that TVA has bought the coal for.

"Q. The bids include an analysis of the coal to be furnished on the bid and you take that in determining the cost of the coal? "A. That is correct, each bidder has to specify the quality of the coal that he would propose to furnish, that is taken into consideration in determining the destination BTU cost of the coal.

"Q. Now, on those sheets in Exhibit 1A through 1J, which show several plants, the award in each case was made with a view to securing the coal for the plant which is underlined on the particular sheet? "A. These tabulations list, in a number of instances, more than one TVA plant. The BTU cost that is listed for each of those plants and the one that is underlined indicates the particular plant that the coal was consigned to.

1553 "Mr. Kramer: Would you take one of these sheets of a particular exhibit and point out with particularity just what you are testifying about now so that the record will be clear, please, sir?

"You are now referring to a particular sheet in exhibit what, Mr. Rowntree?

"Mr. Rowntree: Exhibit 1B."

"The Witness: On this particular sheet we have a listing of five TVA plants. These are Shawnee, Johnsonville, Colbert, Gallatin and Widow's Creek. Under each of the plant headings there is indicated a destination BTU cost for coals if it could be determined. In some instances there is an asterisk, which indicates there was no competitive transportation rate to that particular plant from the source from which the coal was offered.

"The first award listed on this sheet involves coal bought from Coyltown Mining Company. That coal was consigned to the Johnsonville Steam Plant, so the BTU cost under the heading of 'Johnsonville' is underlined to designate that the coal was consigned to that particular plant."

Mr. Rowntree: We would like to pass to the jury this Exhibit 1B with a word of explanation, if your Honor please.

1554. Mr. Rowntree: Ladies and gentlemen of the jury, you will observe that these contract award sheets is rather bulky. The last question and answer referred to this first item here, this page 1 of the Exhibit 1B. (Exhibit 83) And the first column shows contractor, Coyltown Mining Company.

The next column gives the contract number — the TVA contract number; the next column gives the tonnage awarded in that spot coal contract; the next column gives the mine from which the coal is to come, and in many instances you will observe that the mine is not the contractor.

The contractor may, in some instances, be the same as the mine, but there being sales companies who sold other people's coal sometimes the contractor will be different from the mine name in quite a few instances.

The next column shows size of coal under the contract. Coal comes in different sizes, and this shows what amount was offered under a particular size.

The next column shows the mode of transportation. And I take it that "I.C." means Illinois Central.

1555 Then Shawnee, Johnsonville, Colbert, Gallatin and Widow's Creek are listed in series here in separate columns, those being five plants of the TVA. And these columns show the delivered cost per million BTU.

That is a unit of cost in the coal business, and BTU is a technical phrase that I am not an expert on and probably some of you know more about it than I do. But it is a unit of heat value and costs on these sheets are determined according to the cost of a million BTU of heat unit.

Johnsonville was the plant to which TVA consigned the coal on this particular award, as is shown by the underscoring of the cost in the column under Johnsonville Plant.

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By Mr. Rowntree:

"Q. Now, that underlining of that figure under Johnsonville Plant on that line results from computations made by TVA from the bid rather than something appearing 1556 on the bid itself, in other words, the bid does not specify that that coal will go to Johnsonville but he merely submits a figure of cost at the mine and the analysis of the coal and the computations of TVA determine to which plant the coal will be consigned? "A. Well, the computation by TVA determines the destination BTU cost and then the location to which the coal is consigned is determined on the basis of what appears to be to the most advantage of TVA.

"Q. Mr. Hill, these lists in Exhibit 1A through 1J also show unsuccessful bids submitted on the various advertisements for coal in addition to the actual awards made, is that correct? "A. The lists that are included in those particular exhibits show the unsuccessful as well as the successful bidders only with respect to spot offers, they do not include the unsuccessful bidders on term offers.

"Q. With respect to those unsuccessful bids the TVA has likewise made computations of costs which appear on the sheets? "A. That is correct.

"Q. Mr. Hill, I show you a copy of a statement entitled 'TVA's Coal Mining Program' purportedly put out by the Tennessee Valley Authority, Knoxville, Tennessee, April 11, 1956.

1557 "Do you recognize that as being a TVA publication put out at about the time mentioned. "A. Yes, I do.

"Q. Does that correctly set forth the TVA coal buying program and problems?"

Mr. Kramer: Now, your Honor, of course we object to this introduction for the reason that it is a course of action of a governmental authority according to this testimony.

Mr. Rowntree: If your Honor please, we will waive this

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exhibit. I think the deposition pretty well explains what we wanted to get in.

The Court: All right.

(The reading of the deposition was continued.)

By Mr. Rowntree:

“A. To the best of my knowledge this does correctly set forth the buying program and problems associated with it as of that time.

“Q. Mr. Hill, I show you a sheet entitled ‘Facts about TVA Steam Plants’ and ask you if you recognize that sheet as being a publication put out by TVA? “A. Yes, I do.

“Q. And will you state whether or not that correctly sets forth the facts with respect to the steam plants of 1958 TVA as of May, 1960? “A. To the best of my knowledge it does set forth such facts but there is a lot of material on here that I am not directly associated with or wouldn't be in a position to say whether it was accurate or not.

“Q. It is a publication put out by TVA? “A. That is correct.”

Mr. Rowntree: We offer that as the next exhibit.

If your Honor please, I would like to read five of these columns.

Mr. Kramer: This is which one of the exhibits?

Mr. Rowntree: It is the “Facts About TVA Steam Plants.”

The first column reads: -----

Mr. Kramer: This is a paper published, as I understand it — I don't see the date on it — but I think the question indicated the date of publication is subsequent to December, 1958 and covered alleged facts subsequent to that time.

Mr. Rowntree: This pertains to facts over the whole period of the development of the TVA steam power system, and we offer it for the same purposes as was offered the contract award sheets, your Honor, showing the devel-

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opment of the TVA steam plant system over the 1559 years. That portion after December 31, 1958 is offered only with respect to the question of conspiracy and on the question of monopolization or attempt to monopolize.

The Court: Did the witness file that as a part of his testimony?

Mr. Rowntree: Yes, sir.

The Court: And he verified what is in it?

Mr. Rowntree: This is a government publication.

Mr. Kramer: We are not attacking, your Honor, the accuracy of what has come from the TVA and TVA records. Frankly, I told the Court and jury that, but we do say, your Honor, statements contained herein as to dates which are subsequent to December 31, 1958 are irrelevant, immaterial, confusing and prejudicial, your Honor, and a number of these — for instance, the size of the plant and the unit, date of installation of generating units within various of these TVA plants. Of course, they show or have tendency to show coal consumption and dates long after the period.

Here is the witness' testimony, your Honor, "To the best of my knowledge it does set forth such facts" that he was asking a question about — he was asking about certain facts

— "To the best of my knowledge it does set forth 1560 such facts but there is a lot of material on here that

I am not directly associated with or wouldn't be in a position to say whether it was accurate or not." Then he asks the question if it is an official publication which is put out by the TVA and he answers.

That is the basis of our objection, your Honor.

Mr. Rowntree: We are, of course, trying to show the development of the TVA market over the years. The question of whether or not a market has a possibility of being monopolized under the state of facts proved in the record, cannot be determined without considering also the development of the market, the growth of the market.

For the period before December 31, 1958, we offer this

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proof both with respect to damages and conspiracy. For the period after December 31, 1958, we offer it on the question of continuing conspiracy of the nature and existence of the conspiracy which existed throughout the period that we charge the conspiracy existed, and upon the question of dangerous possibility of monopolization of this market.

The Court: Overruled.

(Exhibit No. 92 was filed.)

1561 Mr. Kramer: May I just state one more thing?

Of course, your Honor hasn't seen this exhibit, but just as an example of what it contains and the basis for our objection to certain items on this exhibit, the last unit in commercial operation or scheduled, and the date shown is October 1962, and yet they are trying to project what the cost is per kilowatt basis would be of power — I mean of coal that will be used in that plant as late as October 1962, projecting it that far in the future. We think that sort of figure, your Honor, doesn't show anything with reference to conspiracy that they claim existed material to this lawsuit, but it is pure speculation, pure guess, and has no place in our judgment in the evidence in this lawsuit.

The Court: Well, I sustain the objection to the extent indicated by counsel in the last objection. Those projected figures are in the opinion of the Court too speculative to put into this record for the determination of the jury. But the actual figures during the period that is involved and the actual figures contained in the pamphlet subsequent to that period are received for whatever hearing they may have on the conspiracy during the period that is involved and the alleged damages incident thereto, and the
1562 figures are received after the period, namely those figures which relate to periods subsequent to December 31, 1958, on the question of the attempt to monopolize.

Mr. Rowntree: I will read from the first column which gives the name of the TVA plant and read from another

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column estimated annual coal use at 80 per cent plant load factor.

I will read from another column, construction started, and another column headed first unit in commercial operation. And the next column, the last unit in commercial operation.

Colbert steam plant, estimated annual coal use, 3,600,000 tons.

Mr. Kramer: Now, your Honor, that is part of what I am objecting to. As I understood, your Honor sustained that objection. Now that is the estimated annual coal use based on a 80 per cent operating capacity when this plant is completed in October 1962.

Mr. Rowntree: We will omit that one. Strike 1563 the 3,600,000 tons.

Next column. Construction started October 15, 1951. First unit in commercial operation January 18, 1955. We will omit the figure on the last unit in commercial operation, as it appears after the date of the publication.

The next steam plant, Gallatin, estimated annual coal use, 3,000,000 tons.

Mr. Kramer: We object again to that one for the same reason that that is the estimated coal to be consumed when this plant is completed, which is given as August 9—a guess at the date of completion—August 9, 1959, and they are figuring on an 80 per cent capacity.

Mr. Rowntree: That occurs before publication of this, your Honor. That plant had already been completed when this was published.

Mr. Kramer: But it wasn't completed at the time of the termination of the period for which damages are sought, claimed to be under the conspiracy. I think both of those are out. This one is also out. Of course, your next one is within your period.

Mr. Rowntree: This is not an estimate.

The Court: Is this an actual figure?

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Mr. Rowntree: Actual figure.

1564 The Court: Objection overruled.

Mr. Rowntree: The next column, construction started May 11, 1953. First unit in commercial operation November 8, 1956. Last unit in commercial operation, August 9, 1959.

Mr. Kramer: That has the same objection, your Honor.

The Court: Same ruling.

Mr. Rowntree: Next steam plant, John Sevier, estimated annual coal use, 2,000,000 tons. Construction started October 14, 1952. First unit in commercial operation July 12, 1955. Last unit in commercial operation October 31, 1957.

Next steam plant, Johnsonville. Estimated annual coal use, 4,000,000 tons. Construction started May 12, 1949. First unit in commercial operation October 27, 1951. Last unit in commercial operation August 20, 1959.

Next steam plant, Kingston.

Mr. Kramer: Wherever those dates are subsequent to December 31, I want our objection to show it is continuing and I will not repeat it.

The Court: That is all right.

Mr. Rowntree: The next steam plant, Kingston. Estimated annual coal use, 4,300,000 tons. Construction started April 30, 1951. First unit in commercial operation February 8, 1954. Last unit in commercial operation December 2, 1955.

1 The next steam plant, Paradise. Estimated annual coal use, 4,300,000 tons. We will strike that.

Mr. Rowntree: That is right.

The next steam plant, Shawnee. Estimated annual coal use, 4,100,000 tons. Construction started January 6, 1951. First unit in commercial operation April 9, 1953. Last unit in commercial operation, October 12, 1956.

Next steam plant, Watts Bar. Estimated annual coal use, 730,000 tons. Construction started August 8, 1945.

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First unit in commercial use March 16, 1942. Last unit in commercial operation April 8, 1945.

Next steam plant, Widows Creek.

Mr. Kramer: I thought that was one that was excluded.

Mr. Rowntree: We will omit the tonnage. Construction started March 28, 1950. First unit in commercial 1566 operation, July 1, 1952. And the next column goes beyond the date of this publication. That is the last.

The Court: How many steam plants are there involved?

Mr. Rowntree: There are nine on the list, your Honor.

The Court: Where are they located?

Mr. Rowntree: We have got a map. We will introduce it right now.

I might say for the record that the Shawnee plant —

The Court: Where is Shawnee?

* * * * *

Mr. Combs: Illinois.

Mr. Rowntree: It is across the river near Paducah.

The proposed Paradise plant is in Kentucky. The Johnsonville, Gallatin, Watts Bar, Kingston and John Sevier plants are all in Tennessee. And Widows Creek and Colbert are in Alabama.

I think that covers it.

* * * * *

1567 By Mr. Rowntree:

"Q. Is the Tennessee Valley Authority the largest coal buying consumer in the United States? "A. Yes, that is correct."

* * * * *

"Q. Mr. Hill, I show you a document which purports to be a copy of a contract between TVA and Clinchfield Coal Company Division of Pittston Company.

"Mr. Combs: What is the date of that?

"A. Dated July 8th, 1957.

1568 "Q. Will you state, Mr. Hill, whether or not a contract was entered into by TVA and Clinchfield Division of Pittston Company about the time men-

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tioned? "A. Yes, TVA did enter into a contract with the Clinchfield Company at about the time stated.

"Mr. Rowntree: It is stipulated by and between counsel that the document is a true copy of a contract entered into by TVA and Clinchfield Division of Pittston Company, with the exception that this copy does not contain the terms and conditions which were attached to the original."

Mr. Rowntree: I think that we have agreed now on those terms and conditions since we have gotten a copy of those and checked them with counsel.

Mr. Roberts: They have been attached.

"Q. Mr. Hill, can we have made available to us the other papers that are not attached" to that contract?

Mr. Rowntree: That is the ones we later got.

Mr. Kramer: That is the ones we are talking 1569 about now, your Honor.

Mr. Rowntree: That is right.

Mr. Rowntree: It might clarify localities and names. I offer that as the next exhibit, being a small scale map of the TVA system.

(Exhibit No. 93 was marked for identification and filed.)

1570 "Q. And does the map on the first page give a diagram of the Tennessee Valley region showing the location of the steam plants? "A. Yes, it does."

"Q. None of these steam plants were moved in between 1958 and 1960, were they, Mr. Hill? "A. Well, none of the major plants were moved nor are expected to be moved, but we have discontinued some very small steam plants just within the last few months.

1571 "Q. Can you state what those steam plants are?

Are they steam plants or are they hydroelectric plants? "A. They are steam plants, but I don't see any of

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those that have been rendered obsolete listed on here, so I think this publication takes care of that point.

"Q. I show you a map entitled 'TVA Power System' and ask you if that is a publication of the TVA? "A. Yes, this is a TVA publication.

* * * * *

"Q. Mr. Hill, is the same true with respect to this map entitled 'Tennessee Valley Authority Transmission System' dated July, 1958? "A. This is a TVA publication."

Mr. Rowntree: We offer that as the next exhibit.

(Exhibit No. 94 was marked for identification and filed.)

(The reading of the deposition was continued.)

1572 "Q. I show you one more map, Mr. Hill, entitled 'Tennessee Valley Authority Transmission System' dated July, 1958, this being a much larger map than the last one."

* * *

"Mr. Combs: Is it the same map?"

"Mr. Kramer: Mr. Robertson has the other one.

"Mr. Rowntree: It is a different presentation, I believe.

"The Witness: It shows the same Southern states, but there is some information on the two maps that is different.

"By Mr. Rowntree:

"Q. This last map is a publication of the Tennessee Valley Authority? "A. That is correct.

"Mr. Combs: Just for my information, does the large map contain all of the information that is on the smaller map with some additions to it?

"The Witness: I really don't know."

Mr. Rowntree: We offer that map as next exhibit.

* * * * *

1573 (Exhibit No. 95 was marked for identification and filed.)

* * * * *

"Q. Mr. Hill, I show you Exhibit 1-A, the sheet headed 'List of awards, coal invitation to bid, Requisition No. 27.

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Bids opened July 27, 1959', and refer you to the second item, 'Name of contractor — Inter-Mountain Coals, Inc., Shipping point — Morco, Tennessee'."

* * * * *

1575 "Is that coal coming from the Pocahontas Fuel Division of Consolidation Coal Company? "A. The award that you refer to was made as a result of bids opened in July, bids opened July 27, 1959. The award was made to Inter-Mountain Coals, Incorporated, as principal on the contract.

* * * * *

1576 "The source of the coal on that particular contract was contemplated to be produced by Pocahontas Fuel Company at mines near Morco, Tennessee, and Pocahontas Fuel Company is a division of Consolidation Coal Company.

* * * * *

"Q. Now, there are a number of other awards or bids in this exhibit with the same contractor named, with the same shipping point. Do those all include coal coming from the Pocahontas Fuel Division of Consolidation Coal Company? "A. I am sorry, I don't understand that question. This tabulation lists a number of awards that were made as a result of bids received on the July 27th bid opening, but there is only the shipping point listed as different for each award."

* * * * *

"Q. Mr. Hill, will you state whether or not you have received a number of bids from Inter-Mountain Coal Company designating Morco, Tennessee, as the shipping point of the coal? "A. We have received some bids from the Inter-Mountain Coal Company which offered coal to be shipped from Morco, Tennessee.

* * * * *

1577 "Q. Did those bids cover coal to be shipped by Pocahontas Fuel Division of Consolidation Coal Company from Morco? "A. Yes. All bids that we have received from Inter-Mountain for coal to be shipped from

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Moreco would have been produced by the Pocahontas Fuel Company.

"Q. Mr. Hill, you furnished us a copy of Southern Freight Association, Section 22 Rail Rate Quotation dated August 29th, 1960, is that a copy of it? "A. This appears to be a copy of the quotation that I furnished to you."

* * * * *

1578 "Q. Mr. Hill, when TVA makes a coal contract with the coal seller, does TVA frequently cancel that contract? "A. No. It would be very seldom that TVA cancels a coal contract.

"Q. Did you attend a meeting in Knoxville in the offices of the directors of the Tennessee Valley Authority about March 21st, 1958, with certain representatives of coal producers and a representative of the United Mine Workers of America?"

* * *

"A. I have attended some meetings in Knoxville at which our board of directors were present, and at which representatives of the United Mine Workers were also present, but as to a specific date of March 21st, 1958, I couldn't be exact on that.

"Q. Were representatives of coal producers also present or coal producers association? "A. In some of the meetings that have been held with our board in which a representative of the UMWA was present, members of various coal producing associations were also present.

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* * * * *

"Q. Were representatives of coal producers also present or coal producers association? "A. In some of the meetings that have been held with our board in which a representative of the UMWA was present, members of various coal producing associations were also present.

"Q. At any such meetings that you attended, was the practice of TVA of cancelling contracts after they were entered into, was that matter a principal

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part of any such discussion? "A. The TVA doesn't have a practice of cancelling coal contracts. If a contract is cancelled, it would be for cause, but I am not sure just the significance of your question as related to these meetings.

"As I recall, from such meetings that I participated in, the matter of cancellation of coal contracts was not the subject of discussion.

"Q. State whether or not this is so. Has TVA made a practice as follows: Awarding a bid of "X" cents per million BTU and before that coal was delivered TVA would cancel part of that coal and say that, 'We are probably going to take this coal after while, but if you want us to take it this week, our bids are lower.' Has any such practice as that been carried on by TVA? "A. Not to my knowledge.

"Q. Has any such question been raised at any of these meetings that you mentioned? "A. I don't recall any such question.

"Q. What was the subject matter of those meetings at which the United Mine Workers had a representative present? "A. As I said, there has been more than one meeting.

"Q. Yes. "A. The subject matter varied among
1581 some of the meetings. The purpose of the meetings, as far as I am concerned, was for discussion among interested people in the coal industry with TVA management to try to seek a means of developing better relations and to try to find a way of TVA accomplishing its objective of buying coal which would be well received by the industry in general.

1582 "Q. Was there any particular problem that called these meetings together? "A. I wouldn't be able to answer that in that the meetings were requested by the coal associations in general and I don't believe they ever told us specifically that they were quarreling with some particular phase of our program which made it desirable for them to have such a meeting.

"Q. You did not fathom from these meetings what the

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particular problem was? "A. Oh, I think, as I said, in each case there was an effort being made to try to improve relations between the coal industry and TVA and to try to find a better way of accomplishing the job. That, as far as I am concerned, was the principal and the basic reason for the meetings, beyond that I don't know."

* * * * *

(The cross examination was read by Mr. Combs and Mr. Rayson.)

* * * * *

1583

"CROSS EXAMINATION

By Mr. Kramer: "

"Q. Mr. Hill, in these awards of coal contracts, as I get your testimony, they are made upon three separate bases known as a spot contract, a term contract and a negotiated contract, is that correct? "A. That is correct. All of the spot and term contracts are made after advertising and awards are made to the low bidders.

"Q. Is there any difference in the method of advertising for bids on term contracts and spot contracts and, if so, explain? "A. Yes. I'd like to finish with my other statement first.

"Q. Pardon me. "A. That the negotiated contracts that you referred to in all instances have been made as a result of emergency conditions.

"Now, in response to your second question, our term contracts are made from bids which are received in sealed envelopes from prospective bidders. They are opened and read in public.

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"Our spot contracts are made from bids which are received from prospective bidders but they are not opened and read in public. That is the primary difference.

"Q. On the advertisements for term contracts, how do you select the people to whom notice is given that you are requesting bids for such term contracts? "A. We maintain

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in this office a mailing list of prospective suppliers which we have developed over the years. This list covers responsible coal companies who might be interested in offering coal to TVA and we send to this list of prospective suppliers copies of our invitation notices.

"Q. Is that list revised from time to time so that new companies are added? "A. Yes, it is.

"Q. Even though you do not have the name of a coal producer on that list, if he requested such information, if the producer requested that he be listed, would he be listed and given an opportunity to bid? "A. If there was a reasonable chance that he could be competitive in our program he would be listed. Now, the reason I said "a reasonable chance" is that transportation rates have a strong bearing upon the supplier's ability to compete in our program, so any supplier in the Tennessee, Alabama, West Kentucky, Illinois or Virginia in all probability would be added 1585 to this list, but if someone operating a coal mine in Pennsylvania asked to be included it would be practically impossible for him to be competitive so that he would not be included.

"Q. Is the same true with reference to spot contracts so far as the persons to whom notices to bid are sent? "A. Yes. We use practically the same mailing list for both type of purchases. The only difference would be dependent entirely upon the interest of the suppliers themselves.

"Q. Now, on the negotiated contracts, which you say are emergency requirements, would you explain briefly how you handle those? "A. Well, our board of directors has established a policy which permits us, in the event the storage and stock-pile of coal at any of our plants get to a level of less than 60 days supply, that we may go into the market and make purchases through negotiation. Any such purchases are limited to a maximum term of six months and we would follow the same general practice in making emergency purchases as for regular advertised purchases inso-

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far as contacting several suppliers for offering us coal, but we would not ask that sealed bids be received.

"In some instances it might be handled by tele-
1586 graphic quotations, in some instances it might be
handled by telephone quotations, depending upon the
real urgency of the situation.

"Q. Are those bids awarded in the same method as you have indicated that you awarded the others, that is, I don't mean procedure-wise but in the determination of who is the best bidder or determining the cost at the BTU level? "A. Yes. We use the same process of determining the destination BTU cost and we would buy from the low bidder who could furnish the coal.

"Q. When these bids are opened, I refer now to the term contracts which you say are opened publicly, that is, the bids on the term contracts, do, as a rule, a number of the operators attend the opening of those bids? "A. Yes. We have generally very good representation from the coal industry at these openings.

"Q. Now, I notice in the copies of the reports that are filed here as exhibits that the unsuccessful bidders for term contracts are not listed while the unsuccessful bidders for spot contracts are listed.

"Would you explain the reasons for that, if there is a reason? "A. Yes. The reason for the term contract bids not being listed and sent to the various coal producers or
1587 coal companies is that they are afforded the opportunity to sit in on the opening and take down any information that they might find desirable, whereas in the case of the spot bids they are not opened in public, it is a less formal program and the bidders are not permitted to see other bids of competitors, so, as a result of that, then at the end of each month we send to any bidder who offers us coal not only a listing of the awards but a listing of the other bids that were received which did not result in awards.

"Q. And that goes to every bidder? "A. Every bidder, yes, sir.

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"Q. Who submitted a bid for a spot contract? "A. That is correct.

"Q. When did TVA begin the purchase of coal or about when? "A. It is pretty difficult for me to say just exactly when it began but it goes back for many, many years, I'd say 20 years ago at least, coal purchases by TVA became a pretty important factor in our program with the advent of the construction of these new steam plants which were placed into service during the fifties, but I think, as I recall, in the calendar year 1950 TVA's total coal requirements were only about a half a million tons whereas currently they are approximately 20 million tons.

"Q. All right. How about in '58, which is the 1588 last year involved in this litigation, about what would you say they approximated? "A. Our receipts in '58 were, as I recall, about 19 million tons, something on that order.

"Q. Can you, from memory, tell us about the amount of money that would be involved in that 19 million ton purchase? "A. I believe I will back up on that and say probably closer to 18 million tons and I would estimate 80 or 85 million dollars delivered.

"Q. This increase in consumption of coal has been brought about, of course by increasing generating facilities of TVA through steam plants. In other words, the addition of steam plants to your system and enlargement of the ones already in existence? "A. Well, it came about primarily by the building of new plants altogether, new steam plants altogether, although there has been some increases in the capacity of some of these distant plants.

"Q. To what do you people in the Tennessee Valley Authority attribute this increased demand for power which made necessary the increase in facilities? "A. Well, the principal factor to which we attribute this increased demand is the requirements of power of the federal govern-

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ment, principally AEC.

1589 "Q. Can you tell us what proportion of power, roughly, in the years '54 through '58, I mean of the power generated, went to the federal government and its agencies? "A. Oh, I think I can be pretty specific with respect to '57 and '58. During that period about 50 per cent of our total generation went to government agencies.

"Q. Would that percentage be less or more if you went back to '54, '54 through '57? "A. As a percentage it would probably be a little less, be less and it grew during the period from about '53 up to '58. It grew pretty rapidly, say percentage wise. In '54 it was probably relatively a small part of the total generation but it grew each year and up until about '58 it was representing close to 50 per cent.

"Q. Being a sale to a governmental agency, I take it that you comply or required the producer to comply with the Walsh-Healy Act, do you not? "A. Yes. All of our contracts that exceed \$10,000 are subject to the Walsh-Healy Public Contracts Act, which is the same for any purchases by any government agency.

"Q. Do you have some sales to other governmental agencies aside from the Atomic Energy Commission? "A. You are talking about power sales?

1590 "Q. Power sales I mean, yes, sir. "A. Yes. We sell power to the installation at the Redstone Arsenal in Huntsville, Alabama; we sell power to the Army installation over at Tullahoma. There's a couple of other power customers who are governmental customers.

"Q. Can you give us for any year, say '56 or '57 or '58, the proportion of the coal purchases which were awarded to Tennessee producers? "A. Be pretty difficult for me to give you the actual award distribution but I think I can give you some figures on actual receipts.

.

"Q. (By Mr. Kramer) I am really interested back to

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1954 running through '58, if you have those figures. "A. With respect to Tennessee and the total receipts?

"Q. Right. "A. All right. In '54 TVA received from Tennessee 4,291,000 tons of coal. This is coal actually produced in Tennessee. Our total receipts during that year was 10,196,000 tons.

In 1955 our total receipts from Tennessee was 1591 4,531,000 tons. Total receipts for that year was 14,377,000 tons.

"For 1956 TVA's total receipts from Tennessee was 6,901,000 tons. TVA's total receipts in that year was 20,354,000 tons of coal.

"Now, I might explain here at this point that during this particular year we added a tremendous amount of coal to our storage at various plants. We added, as I recall, something on the order of two to two and a half million tons, so that this may be misleading unless you understand that this is a received figure and not actually burned.

"Q. I see. "A. Now, in 1957 TVA's total receipts from Tennessee was 5,664,000 tons. Total receipts for the same year was 19,581,000 tons.

In 1958 our total receipts from Tennessee was 4,763,000 tons. Total receipts from all sources was 17,033,000 tons. Now, in that year we made an adjustment in the stockpile and our consumption was considerably higher than the actual receipts.

"Q. That was one of the drought years when the hydroelectric power was not as available? "A. That was a drought year, yes, sir.

"Q. Now— "A. Might state that all of these figures that I have given here are calendar year receipt figures, not fiscal year figures."

Mr. Combs: I will just read the comments to make it more clear.

"Mr. Rowntree: Now, Mr. Kramer, in order that we

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might have it all in one place, we would like to have him go on. I take it you object.

"Mr. Kramer: You mean you want to ask for the other two years?"

Mr. Rowntree: Yes, sir."

Mr. Combs: These are past the 1958 period. For that reason Mr. Kramer objected to that.

Shall I go ahead with the answer?

The Court: If you want to.

Mr. Kramer: Of course, we are objecting to them, and Mr. Rowntree asked that they be inserted to 1959. I think he said he did not have '60, and Mr. Rowntree has asked for the 1959 figures. Of course we let the witness put them in subject to our objection, and we continue our objection.

The Court: All right.

(The reading of the deposition was continued.)

Mr. Combs: "Mr. Kramer: You mean you want to ask for the other two years?"

"Mr. Rowntree: Yes, sir."

1593 "A. For 1959 TVA's total receipts from Tennessee was 4,311,000 tons. Our total receipts were 17,808,000 tons. We made some further adjustments in stockpiling here and actually consumed more coal in '59 than we received.

"For 1960 I don't have that information.

"Q. In your study that you have made of the coal produced, if you have made such study in the respective states and the percentage of such coal that was sold to TVA by the producers, can you give us any figure for any of these years, '58 and beyond back of it, showing the percentage of the total coal produced in Tennessee which was actually acquired by TVA? "A. I think I have that information here.

1594 "Q. Would you start with 1954 and give us for the record the percentage of total coal produced in

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Tennessee which was sold to TVA? "A. According to the information that we have compiled on TVA's total coal received from Tennessee versus the total production in the state, and we have used in connection with the total production in the state the figures published by the Bureau of Mines.

"Q. That is the Federal Bureau of Mines? "A. The Federal Bureau of Mines, that's right.

"Q. All right. "A. These are the comparisons for the years '54 through '59.

"Q. Fifty-nine. Well, I am going through '58."

Mr. Combs: Mr. Rowntree wanted him to go on.

Then go ahead with the answer.

(The reading of the deposition continued.)

"A. I am going to give you just the percentage figure of our receipts versus total production in the state.

"Q. Yes. "A. In 1954 TVA received 66.7 per cent of Tennessee's production."

* * *

"The Witness: In '55 it was 64.2. In '56 it was 77—well, 78 per cent.

1595 "Mr. Combs: That is '56?

"The Witness: That is '56.

"Q. (By Mr. Kramer) Do you have '55? I beg your pardon, go ahead, you have given that. Fifty-seven? "A. In '57 the percentage was 71.2.

"Q. Fifty-eight? "A. Fifty-eight, 70.2."

Mr. Combs: Now Mr. Rowntree asked for the additional year of 1959. Would you go ahead?

Mr. Kramer: We continue, of course, our objection.

(The reading of the deposition continued.)

"The Witness: 1959, the percentage of TVA's total receipts versus total production in the state of Tennessee, TVA received 72.9 per cent of the state's production.

"Q. (By Mr. Kramer) Now, while you have your sheet open at that page, do you have your percentage from the

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state of Kentucky? "A. If you had come yesterday I wouldn't have had this but today I do have it.

"Q. You will have to admit that I didn't call you and ask you to get this up. "A. No, I didn't develop it just for your purposes.

"Mr. Rowntree: May I ask if it is broken down 1596 between Eastern Kentucky and Western Kentucky?

"The Witness: Yes, it is.

"Q. (By Mr. Kramer) All right. Give it that way, I have no objection to that, beginning with '54, please. "A. You want the percentage figure of our receipts from each of the two fields, East and West Kentucky, versus the total production of those fields?

"Q. That is correct. "A. For each of these years, '54 through '58?

"Q. That is correct, sir. "A. For 1954 TVA received from East Kentucky 1.2 per cent of the field's total production. For the same year, 1954, from West Kentucky we received 17.2 per cent.

"For '55 receipts from East Kentucky amounted to 1.6 per cent of the field's production. From West Kentucky it amounted to 23.1 per cent.

"For '56 our receipts from East Kentucky amounted to 2.1 per cent of the field's production. From West Kentucky for the same year it amounted to 24.9 per cent.

"For '57 TVA's receipts from East Kentucky amounted to 1.8 per cent of the field's production. From West Kentucky it amounted to 27.1 per cent.

"For '58 TVA's receipts from East Kentucky amounted to 2 per cent of the field's production. From West 1597 Kentucky it amounted to 25.8 per cent.

"Q. All right."

Mr. Combs: Now Mr. Rowntree asked for 1959, subject to the objection.

(The reading of the deposition continued.)

"The Witness: For 1959 TVA received 2.4 per cent of

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the production in East Kentucky and for the same year we received 25.8 per cent of the West Kentucky field's production.

"Q. (By Mr. Kramer) I wonder if those same figures that you have in front of you show the percentages from other coal producing states. As I understand the TVA area from which you acquire coal includes Illinois, Virginia, West Virginia and probably Ohio.

"Do you have similar percentages for those states for these respective years? "A. I have it from the states from which we did receive coal for—yes, I do have it for each of those years.

"Q. All right. Let's have you give us the state because I may have missed some of them. I thought Illinois, Virginia, West Virginia and Alabama were in your field. "A. All right. I will give it from each of the states from which we receive coal.

1598 "Q. Please, sir. "A. You have it already for Kentucky and Tennessee.

"Q. Correct. "A. Illinois is one of the states that supplies us with coal. In 1954 TVA receipts from Illinois amounted to 3.5 per cent of the state's production.

"For '55 it amounted to 5.4 per cent.

"For '56, 7.2 per cent.

"For '57, 8 per cent.

"For '58, 7.1 per cent."

Mr. Combs: Then Mr. Rowntree asked for '59, subject to our objection. Go ahead.

(The reading of the deposition continued.)

"The Witness: For '59, 7.5 per cent.

"For Virginia. In 1954 TVA didn't receive any coal from that state in that year but beginning in '55 we have received coal from that state.

"In 1955 TVA's receipts from Virginia amounted to 2.2 per cent of the state's production.

"For '56 it was 5.7 per cent.

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"For '57, 4.3 per cent.

"For '58, 4.3 per cent.

"For '59, 5.5 per cent."

Mr. Combs: Then we made the same objection to '59, your Honor.

1599 Go ahead.

(The reading of the deposition continued.)

"The Witness: The receipts that we have from West Virginia have been such a nominal part of the state's production that I doubt if you would be interested in them. In each case they amount to less than 1 per cent and in most instances it is even less than .1 of a per cent.

"Q. Has there been any substantial up or down variation during this period, '54 through '58? "A. Well, we received none whatsoever from West Virginia in '54 and '55.

"Q. I guess we better go ahead with '56 and '57 and '58. "A. In '56 we received one-tenth of one per cent of the state's production.

"For '57 it was .07 per cent—"

Mr. Kramer: Just a moment. That is one one-hundredths.

Mr. Rayson: Yes, one one-hundredths.

Mr. Kramer: Let's go back with '56 again.

(The reading of the deposition continued.)

"A. In '56 we received .01 per cent of the state's production.

"For '57 it was .07 per cent of the state's production.

1600 "For '58 it was .01 per cent."

Mr. Combs: Then Mr. Rowntree asked for '59, subject to our objection.

(The reading of the deposition continued.)

"The Witness: For '59 it was .003 per cent of the state's production. We received a total of 4,000 tons in '59."

"Q. Go ahead. "A. Our receipts from Alabama have been relatively small always but they are a little more significant than the receipts from West Virginia.

"Q. I guess we better have them. "A. In 1954 TVA received 1.5 per cent of the state's production.

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"In '55 it amounted to .23 per cent of the state's production.

"In '56, .25 per cent.

"In '57, .11 per cent.

1601 "In '58, .09 per cent.

"In '60, .08 per cent.

"Mr. Combs: You mean '59."

"The Witness: It was .08 in '59. Our receipts from Indiana have been rather nominal always. I will give them to you.

"Q. (By Mr. Kramer) Please. "A. In 1954 TVA's receipts from Indiana amounted to .03 per cent of the state's production.

"In '55 it amounted to .44 per cent of the state's production.

"In '56 it was .36 per cent of the state's production and we have received no coal from Indiana since 1956.

"Q. The Tennessee Valley Authority has been interested in the power load, the energy that is disposed of in the Tennessee Valley area for fuel purposes, during the period of 20 years or a little more, 25 years that it has been in operation, has it not? "A. I am not sure I understand that question.

"Q. The use that is being made of electrical energy for heating or fuel and for energy purposes in industry has been a matter of considerable interest to the Tennessee Valley Authority, has it not? "A. Yes, it has.

1602 "Q. What can you tell us about the use of electrical energy for house heating purposes during the years '54 through '58 compared with the use of coal or the previous use of electrical energy for that purpose in the TVA area? "A. I am afraid I wouldn't be able to give you much of an answer on that question since that is out of my territory.

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"Q. Who connected with the Tennessee Valley Authority does accumulate those statistics? "A. Your best source would be Jim Watson, who is director of TVA's marketing division.

"Q. What is Mr. Watson's full name and his location? "A. Mr. J. E. Watson, he is located in the Power Building in Chattanooga.

"Q. With reference to the preparation of coal for marketing do the TVA's requirements make necessary greater treatment or more intense treatment or more thorough treatment of coal in order to market it to the TVA than it does to the usual coal market or less treatment in preparation? "A. The 'usual coal market' I suppose can cover a lot of territory, but if you are comparing our specification requirements with the requirements of retail coal suppliers, our specifications are rather liberal and there would
1603 not be near the necessary preparation for selling coal to TVA as might be required for such a market as might be offered by retailers.

"Q. What about the quality of the coal that would be required for a normal retail market as compared with the quality of the coal that you people would require for your market or your use? "A. Of course, we get a lot of coal that is of satisfactory quality for retail sale or home use in house heating, but I wouldn't want to use some of the coal we get for that purpose. Our specifications are rather liberal in that regard.

"Q. Isn't it true that your purchasing policies and your expansion of coal buying has had the effect of making merchantable very substantial quantities of coal that was not merchantable before you entered this market or entered it so extensively? "A. That is my understanding.

"Q. Under the setup of the federal government during the recent years, during the years '54 through '58, there is and has been or was and has been an agency known as the Small Business Administration and which affects, as I understand, the purchase of coal by governmental agencies as

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well as purchases of other materials or substances.

"Does it enter into your picture? "A. Yes. The
1604 Small Business Administration is interested in our
coal purchases as it relates to the requirements of
their program, but it has never been a problem in that the
small business firms producing coal have always been able
to obtain a very large percentage of TVA's coal purchases."

* * * * *

"Q. (By Mr. Kramer) Would you go a little further and
explain that answer to us, please, sir? "A. Well, the Small
Business Administration classifies a firm as small or large
on the grounds that if the total employment of that particu-
lar firm is less than 500 then it is classified as a small busi-
ness and if it amounts to more than 500 then it is classified
as a large business.

"Many, many of the suppliers from which we obtain coal
have a total employment of substantially less than 500 em-
ployees.

"Q. I believe that there is some sort of an agree-
1605 ment, isn't there, between the Tennessee Valley Au-
thority and the Small Business Administration, was
during the years we are interested in here, under the pro-
visions of which agreement TVA is authorized to set aside
some of its procurements for awards, particularly to the
producers who qualify under the Small Business Admin-
istration? "A. I am not familiar with that particular agree-
ment. We have never set aside any coal purchases for spe-
cific small businesses. There may have been some occasions
for setting aside such purchases of other commodities that
are required in TVA's operations.

"Q. And the reason it hasn't been necessary is that you
do buy a large part of your coal from people who qualify
under the Small Business Administration Act? "A. That
is correct.

"Q. Do you recall or do you know whether or not there
are such agreements, even if it hasn't been necessary to use

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the same, agreements with reference to setting aside? "A. Such agreements have existed with respect to other agencies and I am not sure whether there has been one actually effective with TVA or not.

"Q. In your opinion, are the short term spot orders advantageous to the small operator or permit him to have greater leeway in getting into the coal sales to TVA? "A.

I think they are advantageous to the small operator
1606 and also they offer some advantages to the larger operator, too, to develop a mine.

"Q. To the small operator they offer him what
1607 type of advantage or opportunities? "A. Well, there is a greater market through which he does not have to make long term — any commitment over an extended period of time, gives him an opportunity in his developing the mine to more or less feel his way and not take on obligations which would require a lot of speculation as to what he might be able to do several months or a year in advance.

"Q. Has TVA, in connection with its coal purchases, made any study of mine closures, the closing down of mines that were in operation over various areas during the period '54 through '58 so that you have any definite knowledge you could give the Court with reference to closures of mines in Tennessee or in this immediate area compared with the closing of mines elsewhere? "A. I don't know of such a study.

"Q. You don't know of such a study? "A. No.

"Q. You stated in your direct examination, I believe, that TVA was, during the period '54 through '58, the largest consumer, at least the latter years, '57 and '58, of coal in the United States? "A. No, sir.

"Q. Did you not? "A. No, sir.

1608 "Q. What was your statement? "A. I didn't make such a statement. I said we were the largest buyer of coal.

"Q. I mean buyer of coal. "A. We were not the largest

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consumer in that some of the steel companies did consume more coal than we did, but they produced a pretty substantial part of it themselves.

"Q. In their own mines? "A. Yes, that's right.

"Q. But, as far as the purchases of coal, you were the largest purchaser during those years? "A. To the best of my knowledge that is correct.

"Q. Has the Tennessee Valley Authority, during the years '54 through '58, been offered in bids substantially more coal than was necessary to fill its demands? "A. Yes, we have. I don't recall of an instance where we were not offered more coal than was needed to fill our requirements. Generally there is substantially more coal been offered than was necessary.

"Q. That has been true throughout this entire period of '54 through '58? "A. That's right.

"Q. What are the methods of delivery of coal to 1609 the various TVA steam plants? In other words, what methods of transportation are used for the delivery of coal? "A. Well, the three modes of transportation that are employed in some of the plants — some of the plants are limited to two, and we have some plants that are limited to only one mode of delivery, but the three modes that are made, for instance, at Kingston, where we were receiving some barge coal, currently we are not, we are currently receiving truck coal, and we also receive rail coal.

"Q. Is that plant so equipped, though, that it could receive all three methods of delivery, barge, truck, and railroad? "A. Yes, it can receive all three modes of delivery.

"Q. Now, you referred to one or two plants that did not have the equipment for receiving coal from all three methods of delivery. Would you go into that and explain that a little bit for us, please? "A. Our John Sevier steam plant is equipped to receive rail coal only: Our Gallatin steam plant is in the same capacity, it is equipped to receive rail coal only.

"Q. Now, before you go further, the Court will not be

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familiar with the location and while they will appear on some of these exhibits, would you identify the location and general area of these various plants as you go 1610 through? "A. Our Gallatin steam plant is located in Northeast Tennessee, it can be served only by rail deliveries. The Kingston steam plant is also in East Tennessee, but not as far east as the Sevier plant, but it is equipped so that it could receive either rail, truck or barge deliveries.

"Q. I think you confused two plants there. You were talking about Gallatin and now we are referring to Sevier as compared to Kingston. "A. All right. Our Gallatin plant is located in — roughly I'd classify it as Middle Tennessee — it is on the Cumberland River, and it can be served only by, at this stage at least, by rail deliveries.

"Q. Yes. "A. No, you want me to go ahead with the rest of them?

"Q. Go ahead with the rest of them. "A. Kingston we covered. Our Widow's Creek plant, which is located in Northeast Alabama, can be served by three modes of delivery — truck, rail or barge.

"Our Colbert steam plant, which is located in Northwest Alabama, can be served by barge or rail deliveries.

"Our Shawnee plant, which is located in West Kentucky, can be served by rail or barge deliveries.

Mr. Rowntree: Did you cover Widow's Creek?

1611 "The Witness: Yes. Those are all of the major plants, steam plants in the TVA system, and all of those plants are currently in operation, and most of them were in operation during the period '54 through '58. I believe that the Gallatin and John Sevier plants didn't come into service as early as '54, but they came in within that period.

"Q. So which plants are equipped for receiving, and were from '54 to '58, for receiving truck deliveries? "A. Widow's Creek and Kingston plants.

"Q. Your entire system is operated on an integrated

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basis, is it not, among the various power plants? "A. Yes, it is.

"Q. And I believe you have tied into your integrated system not only your own plants that you have referred to a moment ago, but some plants that are owned by private industry and which are operated by TVA in connection with its integrated system? "A. That is correct. We are tied into some hydro plants which are operated as an integrated part of the TVA system.

"Mr. Rowntree: May I ask at this point what an integrated system is?

"Mr. Kramer: Go ahead, you may answer it.

"The Witness: I will try to answer it. What we mean when we say 'an integrated system' is that the power load at any particular location may not be served necessarily just from the closest generating station to that location, and all of the system is considered as a whole to finally develop the most economical power that could be moved to that particular installation, which actually might be generated at a further distant plant than one which is near the particular load center.

"I don't know whether I answer you properly but that is the idea.

"Q. (By Mr. Kramer) In other words, you try to handle it so as not to lose any more line load than is necessary in the transporting of power? "A. And to also take into consideration the cost factors as to producing the power. As an example, we will say that the Shawnee steam plant, which produces power more economically than any other steam plant in our system, you might be able to serve a load which was substantially distant from that plant and sustain some of the losses in transmission because of the lower fuel cost to that particular location as versus some other plant which might be closer to the load center.

"All those factors are taken into consideration, line

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losses, of course, but fuel cost of generating the power is also important, and the efficiency of the equipment that is available is important.

1613 "Q. That suggests another question. What percentage do you think of your fuel or coal, rather, is purchased under term contract and what would you think is purchased, just approximately, on the spot contracts? "A. Well, our board of directors has established a policy which requires that we buy at least seventy-five per cent of our coal requirements on term contracts.

"Q. I don't believe we got from you just what we mean by 'term contract' on duration. We may have, but I have forgotten. What is the length of a term contract? "A. Well, most of our term contracts run from one to three year terms, but we do have some as short as six months, and some as long as seventeen years, but a term contract must be at least six months in term to be so classified.

"Q. Now, does the bidder have some options with reference to the length of a term contract at the time of submitting bids? In other words, do your specifications always call on term contracts for a definite three or five-years period or eighteen months, or does the bidder have some options when he is bidding? "A. No, we give the bidder the option of specifying which term is most desirable to him with a certain range.

1614 "Q. In other words, you fix a maximum and minimum and let him bid within that range? "A. That is right.

"Q. What about these term contracts dealing with rate of delivery, do they always specify a definite amount when the bid is advertised per week or per month, or is the bidder given the option of fixing his own rate of delivery to some extent? "A. Well, our invitation terms specify a quantity of coal which we are interested in contracting for, and the bidder is afforded the opportunity to specify what quantity he might want to cover within certain limits. He has the option to specify what is most desirable for

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him to move to us. As a general rule, we say that we are not interested under our term contracts in making awards for more than ten thousand tons a week from a single source. We do not want less than five hundred tons a week from a single source, so within that range, the bidder has the option as to specifying what quantity he might like to deliver.

"Q. The award then would not be based upon the amount he delivered per week or per month, so long as he stayed within those limits? "A. The award would be based on what he specified as the rate of delivery.

"Q. But if a bidder submitted a bid to deliver seven hundred tons a week and one a thousand tons a week, 1615 if both of those figures were within those limits specified in the notice of bids, the difference in that amount per week would not have anything to do with the award, would it? "A. No, we would—Well, we say we would prefer generally, we say we prefer offers in the range of a minimum of a thousand tons a week, up to usually this maximum level of ten thousand tons a week. Anyone offering with that range is considered equal for that particular phase.

"Q. How frequently, as a rule, do you advertise for long-term bids? Is it once a year or ten times a year? That is what I am getting at. "A. Well, your reference to long-term bids—

"Q. (Interposing) I call it term contracts. Simply change the phraseology. "A. Well, we normally issue invitations to bid about three times a year for term contracts.

"Q. Equally spaced throughout the year of—"A. (Interposing) Not necessarily. As a matter of, I guess, general practice, they would be reasonably spaced within the year, but we follow no set pattern in that respect, and in some instances, we may issue two invitations in a year for term contracts, others we might issue as many as four. I don't believe we have ever issued more than four in a

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single year, but generally it will run around there.

1616 "Q. As I recall it, in the coal industry there are what is known as contracts which in effect are declarations of intent, indicating the intent of the person asking for bids to buy a certain amount of coal within a certain period of time, and the other is a direct or binding contract. Which form do you people follow? "A. We follow the form of making direct contracts.

"Q. Not simply a declaration of intent to buy a certain amount, but a direct contract for a specified quantity of coal? "A. That is correct.

"Q. The spot purchase contracts, I take it, or at least the request for bids, are submitted at irregular times, are they not? "A. The spot invitations to bid?

"Q. Yes, sir. "A. Are issued at regular intervals. We, as a practice, issue spot invitations to bid each month. Normally they are issued, oh, between the 20th and the 25th of the month, and they are issued every month, as a general rule.

"Q. What controls or guides you in the amount of coal that you are going to ask for on a spot bid? "A. Well, our spot program is set up as—Our spot program is established primarily, we will say, for the purpose of
1617 gearing our coal receipts more closely to our actual consumption, so the quantity we specify on a spot invitation, to a large degree, is established by the difference between what coal we already have moving in on term contracts and what we need to fill the gap between receipts and expected consumption.

"Q. Suppose that your coal supply has been substantially depleted because of drought, thereby your hydroelectric generation was lowered, more coal is needed because of more generation by your steam plants, is the filling up of that deficit in your stock pile done by short-term or spot contracts, or is it done on term contracts, and would you explain, please? "A. It would be done under both programs. The duration of a heavy load burn would have

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a large degree in determining the method that might be employed to restock the storage supply. If it was a very short duration or very heavy consumption, probably we would use the spot program, but if it lasted for several months, we would employ our term program also to refill that deficit if it came through heavy usage during a drought period.

"Q. I take it from that, then, there is an advantage to both the seller and to TVA in, at times, using the spot purchase or spot bid arrangement rather than the long-term?

1618 "A. We think there are some definite advantages to our sources of supply in using the spot program.

1619 "Q. Would you mind explaining briefly why you think your suppliers are benefited so by the spot program?" "A. Well, as we discussed earlier, the spot program helps not only the small but the larger producers too in developing new operations, but also helps established operations to dispose of what we might classify as distressed coal, coal for which there is no other ready market, or coal, in some instances, such as the resultants from a more premium market production such as the sale of carbon and screenings during periods of production of larger quantities of coal for the domestic market. Those are some of the ways in which the industry, I feel, can benefit through use of the program because it can be utilized for a short period of time. There is no obligation to commit a supplier for several months or a year to dispose of this tonnage which may be of short duration in their actual operation.

"Q. Then, in awarding a contract, either for spot delivery or term delivery, you do not take into consideration at all the size of the bidder, whether he is large or small, if he shows himself qualified to furnish the coal?" "A. No, sir, we do not make any differentiation whatsoever between the size of suppliers if they are capable of performing, according to the way they offer their coal.

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"Q. I take it you don't take into consideration at all whether a mine is operated by union labor or non-union labor, do you? "A. Well, I wouldn't know that information. We don't ask for it in our bid program.

"Q. You make no effort to find out, do you? "A. No, sir.

"Q. What about these bid forms that you sent out, are they complicated and difficult to fill out or not? "A. That would be a matter of opinion. We try to make them as simple as we can so that they won't be classed as complicated.

"Q. I believe that it is true that a great many larger coal consumers or purchasers in the market do not require competitive bidding such as TVA does, or, why does TVA require competitive bidding on its coal awards? "A. TVA is required by law, by the Act which created the Authority, that its purchases be made in general compliance with other government agencies.

"Q. You have established procedures which you feel are open and fair to all potential suppliers, have you not? "A. We feel they are, yes.

"Q. Now, a while ago on direct examination, Mr. Rowntree was asking you something about some protest meetings or something of that sort, I don't know just what they were, and you stated that you had attended some meetings in which, as you recalled it, a representative of the United Mine Workers of America was present. Do you recall who that was that was present representing the United Mine Workers? "A. Mr. Michael Widman is the representative of the United Mine Workers who participated in the meeting with our Board of Directors that I attended and which we discussed a little earlier.

"Q. Do you recall how many meetings that he did attend?

"A. No, I am not sure, two or three or something of that nature.

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"Q. Could you give us any idea of the approximate dates and the places where such meetings were held, Mr. Hill? "A. Oh, all the meetings were held in Knoxville, and I believe about the earliest one was '57-sometime, '57 or '58, I'd think are probably the dates, although I believe some were held, one possibly was held in '59.

"Q. Now, on the '57 or '58 meetings, do you recall the names of any of the operators that were present at those meetings, or representatives of operators? "A. Well, there were some different meetings, and the same parties were not always present in every meeting. I recall, I believe that Tom Tarsy of the United Electric Coal Company was present in one meeting; Pat Smith of the Inter-Mountain Coal Company was present in another one; Jimmy Love of the Blue Diamond Coal Company I believe was in one meeting; Lou Jewell of Peabody Coal Company was in one meeting. Those are some of the producing company representatives who were present. There was also Bill Bayfield of the National Coal Association and someone from the Southern Coal Producers Association, Joe Moody, I believe, was present representing the Southern Coal Producers Association in one of the meetings.

"Q. Do you recall what kind of notices were given to coal operators or representatives of the industry with reference to these meetings when they were held? "A. Well, I don't know what kind of notices the industry may have circulated itself, but the meetings were requested by different individuals. I think in most instances probably the meetings were requested by the National Coal Association, or in the earlier days actually they were the American Coal Sales Association which has been merged with N.C.A., and the correspondence between our offices and the A.C.S.A., I believe, was between General Vogel, who is Chairman of our Board, and Bill Bayfield.

"Q. There was no effort made to exclude any particular

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operator or operators, so far as you know, from
 1623 these meetings, was there? "A. I don't know of any,
 but as I say, the meetings were requested by certain
 groups or certain individuals representing the industry
 and the U.M.W.A. As to what kind of distribution of the
 notice of the meetings that may have been made by the
 Association or the U.M.W.A., or the industry, I really don't
 know.

"Q. Something was asked you in the direct examination
 about cancellation of contracts after bids had been awarded,
 where a bid was awarded to an individual and they failed
 to deliver in accordance with the contract. I am speaking
 now quantitywise rather than qualitywise of coal. Are the
 awards sometimes cancelled? "A. There have been a few
 instances where contracts have been terminated for failure
 to perform according to the contract requirements.

"Q. In the policy that has been followed by the Ten-
 nessee Valley Authority in its coal purchases, has it been
 the effort of the Tennessee Valley Authority to give all
 producers of coal within the area who were interested in
 furnishing coal to TVA, an equal opportunity to sell coal
 to TVA if they would meet the competitive market and
 competitive price? "A. Yes, that is a true statement."

1624 (The Redirect examination was read by Mr. Rown-
 tree and Mr. Robertson.)

"REDIRECT EXAMINATION"

"By Mr. Rowntree:

"Q. Mr. Hill, this 75 per cent of the coal purchased to
 term contracts, how long has that policy been in effect?

"A. Since the beginning of the program. Now, the 75 per
 cent now does not mean that we buy 75 per cent on term
 contracts and 25 on spot. The policy that we must buy
 at least 75 per cent on term contracts, in many instances
 it exceeds 75 per cent.

"Q. Do you know if anybody kept minutes of these

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meetings up there in Knoxville that the operators had representatives at that you attended? "A. There was no formal minutes, to my knowledge. There was, I think, some record or reports written following the meetings.

"Q. Would that be in the office of the Directors of the Authority? "A. There should be a copy in the office of the General Manager.

"Q. Was that a summary or report prepared by TVA or by the meeting jointly? "A. As far as I know there was never a joint report prepared. There was a 1625 report prepared by someone in TVA.

"Q. You don't have a copy of it? "A. Oh, I have copies of some reports around here, but you would have to tell me specifically which meeting you had in mind so I could dig it out.

"Q. That meeting of March 21, 1958, or in that vicinity. "A. (The witness made a telephone call.)

"Q. We will go on while we are waiting on that. Talking about this integrated system, how can you determine where to draw the load or draw the power in order to reach the most economical use of the steam plants? "A. Well, I am not qualified to answer that question. You would have to talk to someone who was more directly associated with it.

"Q. I was trying to avoid an extra deposition if we possibly could. "A. As I understand, you plan to talk to Martin Hochdorf. He would be able to answer it.

"Q. As I understand, there is a machine that measures that purpose, is that right? "A. TVA has a machine which is supposed to be used for the purpose of determining the most economical loading of the system."

1626 Mr. Rowntree: We will skip down to the bottom.

By Mr. Rowntree:

"Q. Mr. Hill, if you locate the report of the meeting of March 21, 1958 that we were talking about before, will you kindly give it to the reporter and mark it as Exhibit 11?

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“A. I don't know, now. I don't know what is in that report, but there may be some things which our people would not agree to have it filed either.

“A. I have a copy of a report that was prepared following a meeting which was held between the TVA Board and staff members and certain representatives of the coal industry, such meeting being held on March 20, 1958, according to the first paragraph of this report. The meeting was held at the request of the coal industry, and during the meeting certain suggestions were offered by the coal industry for some modification in our coal buying
1627 program which the industry considered apparently constructive, and that was the whole purpose of the meeting, was an effort to develop closer working relations, and to try to work out some kind of a system which, apparently, the industry felt would be helpful to it if we did make some modifications in our buying program or
1628 buying procedures. This report was not prepared by me.

“Q. Does the report refresh your recollection as to the specific questions raised for modifying TVA's coal procurement program? “A. Well, apparently, the industry offered certain recommendations for modifications of our term buying program, and a separate set of recommendations for some modifications in our spot buying program. I believe there was a total of five suggestions, or, in substance, there were five suggestions relating to the term contract program and—”

“Q. (By Mr. Rowntree) Will you state what modifications were requested with respect to the spot coal contracts?”

“Q. (By Mr. Rowntree) I will ask you if the memorandum refreshes your recollection with respect to sug-

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gestions made in regard to the spot coal program? A. Yes, I definitely recall these suggestions as having been offered in the particular meeting referred to, suggestions made by the industry.

"Q. And what suggestions were made with respect to the spot coal program? "A. Well, the industry suggested that we limit our spot purchases to approximately 1629 ten per cent of our total requirements. They also suggested we issue separate invitations to bid for each specific plant for which we desired coal, and to specify exactly how much tonnage we desired for each plant. They made some suggestions about the timing of the announcement of awards of spot contracts. As is our practice, we announce the awards or we publish a tabulation which formally announces all spot awards at the end of each calendar month. The industry suggested that any coal that was unshipped on a spot contract at its expiration would just be automatically cancelled. That was the substance of the suggestions."

* * * * *

1630 Mr. Rowntree: If Your Honor please, we would like to introduce the contract as the next exhibit.

(Exhibit No. 96 was marked for identification and filed.)

Mr. Rowntree: We will read extracts from that contract, your Honor.

This is the long-term contract for purchase and sale of coal.

"This agreement, made and entered into this eighth day of July, 1957, by and between Tennessee Valley Authority, a corporation organized and existing under an act of Congress (hereinafter called 'TVA'), and Clinchfield Coal Company, of Dante, Virginia, a division of The Pittston Company, a corporation organized under the laws of the States of Delaware and Virginia (hereinafter called 'Contractor')."

Mr. Kramer: We are continuing our objection to this line of evidence, not as to evidence because this is within

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the period, but for the other reasons heretofore given, which I take it is not necessary to restate.

1631 The Court: That is right. Overruled.

Mr. Rowntree: "Coal to be Furnished: Contractor shall produce (or arrange to have produced) and sell coal to TVA, and TVA shall purchase said coal from Contractor as provided herein. The source, weekly amount to be delivered from that source, and location at which the coal is to be delivered by Contractor to TVA, are as follows: "

"Source: No. 3 Mine near Monterey, Tennessee.

"Weekly Tonnage: 7,500.

"F. O. B. Point: Rail cars, Monterey, Tennessee."

"Price: The following definitions are applicable in determining the price to be paid for the coal under this contract:

"(1) The 'Base Price' shall be the sum of the 'Fixed Fee' and the current 'Bonus Point.'

"(2) The 'Fixed Fee' which is deemed to include all of the Contractor's indirect expenses (i.e. all general expense such as, but without limitation to, insurance premiums, dues and subscriptions, travel expenses, and property and income taxes) and any profit shall be 55 cents per ton."

1632 (Thereupon, Mr. Robertson and Mr. Templeton read the following deposition.)

"MARTIN HOCHDORF

a witness called at the instance of the defendants and cross plaintiffs.

DIRECT EXAMINATION

By Mr. Robertson:

"Q. State your name, please, sir." "A. Martin Hochdorf.

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1633 "Q. What is your occupation, Mr. Hochdorf? "A.
I am Chief of the Computing Center of TVA."

"Q. Would you just state very briefly your duties as Chief of the Computing Center? "A. Yes. I supervise the operation of the TVA computer which is an IBM 704 electronic data processing machine, and I also provide assistance in the analysis and programming of computer problems to those TVA divisions that do not have facilities to provide this for themselves.

"Q. What kind of computations does this IBM 704 computer make? "A. There are two general categories. It carries out scientific and engineering calculations, and the other category is business applications, that is applications in accounting and record keeping.

"Q. Does this machine take facts of the costs of the production of power at the steam plants in the system of TVA and come out with an answer, giving you a result of the cheapest power of the system as a whole that it can produce, telling you which plants can produce at a given time at the cheapest rate? "A. This is one of the factors. You
1634 mentioned the production costs at the plants is one of the factors the machine takes into account in determining the loading of the TVA power plants to come up with the lowest total cost of generating power. There are other factors, that is the relative location of the generating plants in relation to the load.

"Q. If a steam plant is located farther from the place which is to use the electricity than some other steam plant, could you use the elements of cost and put them into this machine and it would give you an answer as to which plant could be increased in production and the other plant decreased in production and produce the electricity at the cheapest cost as between the two plants?"

Mr. Kramer: Now, your Honor, we are going to object

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to this line of testimony because it affects only as TVA's own operation and its cost of production. We don't see where it can have anything whatsoever to do with this lawsuit and we object to it as being irrelevant and immaterial.

The Court: What is the purpose of that?

Mr. Robertson: The purpose of the testimony, your Honor, on Mr. Hill's deposition this morning, he testified that the TVA system, its various steam plants located in the western part of the system and in the east, are 1635 all an integrated system. And we are showing here by this testimony that coal put into the western system can affect the market prices in the entire system.

The Court: Motion is overruled.

(The reading of the deposition continued.)

"A. Yes, you can. Now, may I rephrase this to make sure I understand what you said?

"Q. Sure. "A. You are talking about two plants now, two generating plants?

"Q. Yes. "A. That would supply electricity to loads, and they may have different production costs. Then the 704 program would take into account the different production costs and the distance between the generating plants at the load, and balance these factors so as to come out with the lowest cost generating schedule.

"Q: And, likewise, the information, the cost information, of each of the plants in the entire TVA system can be fed into the machine and give a result as to which plants can be drawn on and the other plants the production slowed down? "A. That is right. The example that we mentioned as expanded to the entire TVA system within the machine.

There are more than two plants involved, but this 1636 principle applies to the determination of generating schedules for the entire TVA system.

1637 "Q. The figures which you use, do they result in

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cost per million BTU, or what figure does it result in? "A. I might perhaps state one general fact concerning our organization, and that is that while I have general knowledge and perhaps because of my profession somewhat detailed knowledge about this particular application, I do not have a complete knowledge of all the programs that are being run here.

"We operate what is known as an open shop, so that primarily the users have responsibility for the programs that they execute, and I am not sure that I can answer all questions in detail, but the cost figures for the steam plants would be in the nature of so many mills per kilowatt hour.

"Q. I probably didn't make my question clear a minute ago. Are the figures used as to the cost of producing the power which would be fed into the machine, would that be in terms of million BTU, speaking now of the coal which is used in the production of power at these steam plants? "A. Well, I believe that the figure which is needed by the program, which is mills per kilowatt hour, would be arrived at by using the mills per BTU for the coal, and then also using the number of BTU required by the turbine to produce a given output, so if you multiply the rate of the mills per BTU by BTU per kilowatt hour, you would arrive 1638 at the mills per kilowatt hour, and I believe there is a provision in the program to fee these factors in separately.

"Q. Mr. Hochdorf, do you know when this machine was first installed and put into use by TVA? "A. Yes. It was installed in June of 1958.

"Q. And it is here in this building in Chattanooga? "A. It is in this building.

"Q. Do you know what method or methods were used prior to the installation and use of this machine to determine the cheapest production cost for the TVA system which this machine now accomplishes? "A. This was not part of my work prior to my becoming chief of the computing center.

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However, I believe that runs similar to the ones that we make on this machine, although in greatly simplified form, were made on a much more rudimentary model of computer, however, it was not done as frequently and more for a guide for general loading conditions on the system, but I have no personal knowledge of this, I was not connected with this work.

“Mr. Kramer: All of the foregoing testimony is objected to as being irrelevant and immaterial.

1639

“CROSS EXAMINATION

“By Mr. Kramer:

“Q. What I understood your testimony to be is that you feed certain facts into this mechanical device, known as IBM Computer 704, and you get certain answers, is that it?

“A. That is correct.

“Q. It doesn't tell you where to buy the coal or what kind of coal to buy, does it? “A. No, it does not.

“Q. Doesn't reflect anything about the name of the operator or the location of the operator from whom the coal should be purchased, does it? “A. No, not to me, certainly. Perhaps —

“Q. (Interposing) Maybe somebody else might get something else out but as far as we are concerned it is what you get out of it. “A. Well, to begin with, I have no responsibility for purchasing coal, and I do not obtain this information from the machines.

1640 “Q. Well, as far as you know, all of the information that you are aware of that comes from the machine is that for a disposition of a certain quantity of electricity at a certain point the plant at one location is cheaper in operation than a plant at some other location, is that right, is that it? “A. The machine takes the production costs at

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the various plants into account in order to determine where the electricity is to be generated.

"Q. I notice hanging on the wall right behind me a graph that says something about the IBM 704 utilization?" "A. Um-mmm.

"Q. I see down here in the bottom of it is a red indication marked 'computing hour' and it next says 'debugging hour' and it next says 'unscheduled maintenance.'

"Is the 'debugging hours' a part of your duty at this facility?" "A. Yes. 'Debugging' is a term that indicates testing of programs, computer programs. When they are first written, they will have errors in them which we call 'bugs'. The process of getting the errors out of the program is called 'debugging'. This is a term that is used in the computing field and well understood by computer people.

* * * * *

1641

"RE DIRECT EXAMINATION

"By Mr. Robertson:

"Q. Can you give us some idea, Mr. Hochdorf, of the size of this 704 computer?" "A. Yes. It has a storage capacity of 16,000 numbers, 16,000 ten-digit numbers may be stored inside of this computer. Ordinarily when you talk about the size of a computer, this is the information that you mean. It can carry out additions at the rate of forty thousand a second, multiplications at the rate of four thousand a second. These are some of the major characteristics of the machine.

* * *

1642 "Q. When you speak of 'programming' you refer to feeding the information to the machine and making a certain pattern from which it can ultimately reach a result?"

* * *

"Q. (By Mr. Robertson) Can you explain to us briefly what you mean by the term 'programming'?" "A. 'Programming' refers to writing the instructions which tells the

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machine what calculations you want it to carry out. The program is a sequence of instructions. These instructions are detailed arithmetical operations calling for information printing information out and so forth.

"Q. With respect to this load factor, what do you do with the data which you receive from this machine? "A. You are referring to the load schedule that the machine produces?

"Q. Yes. Going back now to the information which you get on the cost of production at the various plants within the system. "A. The load schedule is transmitted to the Power Building to the load dispatcher office over telephone lines and is printed out over there automatically on an electric typewriter.

"Q. Do you happen to know what they do with it once it is typed out in the Power Building? "A. Presumably they use it for instructing the generating plants how much load to run, but they have the opportunity to override the information if there is some good reason for it."

"Q. (By Mr. Robertson) This testimony as to the machine giving you the answer as to the cheapest production of electricity of the system as a whole, is that not the principal function of the machine? "A. It is the one that consumes the largest part of the time for which the machine is used. There are other important functions that the machine carries out."

Mr. Rowntree: May it please the Court, we have the deposition of Mr. Taylor Maddox, taken December 8, 1960, at Knoxville.

Mr. Kramer: Now, Your Honor, this was a witness whose testimony the plaintiffs—I mean the cross-defendants, United Mine Workers, took. It is in this case, filed in 1644 this case, and the cross-plaintiffs seek to read this deposition, which as I understand under the rules,

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they have the right to do, but inasmuch as the direct examination was taken by us, we prefer to read it ourselves, and they may read their cross.

The Court: All right.

1645. "TAYLOR MADDOX, SR.

being first duly sworn, testified as follows:

"DIRECT EXAMINATION

"By Mr. Rayson:

"Q. State your name. "A. Taylor Maddox, Sr.

"Q. Where do you live? "A. Middlesboro, Kentucky.

"Q. What is your present occupation? "A. I am a district representative of the United Mine Workers.

"Q. Just what district are you a representative? "A. District 19.

"Q. How long have you held that position? "A. Nineteen years. It will be 20 next March.

1646 "Q. Prior to the time you worked for District 19 as safety director, or as district representative, what did you do? "A. I worked in the mines.

"Q. Mr. Maddox, from the period 1953 to 1958, what were your duties as district representative of District 19 with reference to territory? In other words, what territory did you look after. "A. I had about ten counties that I worked in, and — you said with reference to territories?

"Q. That is right. Now, that is counties. Did these counties remain the same during that period? "A. I don't understand you.

"Q. Did they remain the same from 1953 to 1958, or were you assigned to different territories during that period? "A. No, sir. I was assigned to that territory fully, I believe. There was a time I had part of it and moved to all of it during that period back to 1953.

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"Q. Can you tell us what those counties were? "A. Well, I believe I can name most of them. I would go to Whitley County over at Stearnes, and that county over there, and in Kentucky. I can't call this county now.

"Q. McCreary County? "A. McCreary County, and Scott County and Morgan and Fentress, a little in Cumberland, some in White, some in Picket, some in Pulaski County, Kentucky; and some in Campbell. That must be nearly ten.

"Q. Were there other district representatives working in those counties besides you? "A. Mr. Daniels helped in that. We worked all that section ourselves. I would say I traveled most of it. He stayed mostly in Campbell County.

"Q. Do you have any idea how many mines you looked after in these counties? "A. I believe there must have been around 200 scattered around in those counties.

"Q. Mr. Maddox, do you recall where the Pennington tipple and mine was located. I think it was known as the Phillips Brothers mine. "A. Yes. That was out there 1648 between Jellico and Pioneer, on what we call Pioneer Mountain, I believe.

"Q. Is that where the mine was located? "A. The tipple was there. The mine was on the mountain behind there. I don't know which direction it was, to say directly, but it was back behind the tipple.

"Q. Did you have occasion to go to the mine site proper? "A. I was up there one time where they were deadlifting the coal. I just went up to see if they were in production, and I believe Mr. Daniels was with me at that time.

"Q. Do you recall when that was? "A. No, sir, I don't. I just don't recall that.

"Q. Did you go there on any other occasion or to the tipple on any other occasion that you recall? "A. Yes, we went down there, Mr. Daniels and I did. He got me to go down with him. We went down and met with the men, and

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we had an officers election and we set the local up and got the officers installed.

"Q. Do you recall when this was? "A. I believe it must have been maybe along in May of 1955.

"Q. Do you recall any people who attended this meeting?

"A. I can't name a one of the men that were in the 1649 meeting. It was the fellows, it was their employees, and Mr. Jim Pendleton was around there. He didn't, of course, attend the meeting. Of course he had some of the contracts.

"Q. You say "Pendleton." You mean Pennington? "A. Pennington.

"Q. Was he present? "A. He was at the mine at the tipple.

"Q. Did you talk to him? "A. Yes, I talked with him and Mr. Daniels did also.

"Q. Do you recall anything of the conversation? "A. Well, I don't recall anything that was said particularly as to the words. He was very friendly with us. It was a very congenial meeting we had.

"Q. Was there any harsh words or anything like that at that meeting? "A. No, not a thing.

"Q. Do you know who arranged the meeting? "A. Mr. Daniels told me they had called for us to come down, for him to come down, and he asked me to go with him. That is all I know of the setup of the meeting.

"Q. How long were you there? "A. We stayed about an hour that time, I believe. "Q. Do you recall any other 1650 occasion that you went to the Phillips Brothers mine or tipple? "A. I went down with Mr. Daniels after that. I just don't recall the date. It has been a good while ago. And I am kind of hazy on that. But we went down and waited on the men to come off of the hill, and we talked to them about something or another, I don't know just what it was.

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"Q. Was this after the meeting you mentioned in May 1955? "A. That was after, yes.

"Q. Do you recall how long after that it was? "A. No, sir. I don't. I drove by this place — I might explain this. I drove by this place going down ordinarily to Huntsville to get down that way to southern Tennessee, and there was a few times I would see Jim there and stop and ask how he was getting along.

"Q. You mean Jim Pennington? "A. Yes. I don't remember any other contacts we had outside of that, that I participated in. It was Mr. Daniels' mine that he looked after.

"Q. Did you ever sign them up on a union contract? "A. Not that I remember.

"Q. Have you told us all of the contacts that you have had with Mr. Pennington or the Phillips Brothers with reference to the Phillips Brothers mine? Do you recall any others? "A. I don't recall any others.

"Q. Did you testify Mr. Daniels was present on this occasion when you and he waited for the men to come off of the mountain? "A. Yes."

Mr. Combs: Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

"Q. Mr. Maddox, I believe you testified that you went up to the Phillips and Pennington mine one time before this time when you signed the men up, is that right? "A. I believe that is right.

"Q. One time? "A. Well, I wouldn't confine it just to one. That is just the best I remember about it.

"Q. And on one occasion do you remember exactly who was present, who you saw up there? "A. I don't remember the names of any of those men, Mr. Rowntree. As I say, Jim Pennington was the man I do remember talking with about every time I stopped there; or the few times I did stop there,

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Jim would be there.

1652 "Q. Do you remember how much mining had been accomplished at that operation on that visit, at the time of that visit, the first visit? "A. Of the first visit?

"Q. Yes. "A. Well, they worked some time there trying to get, looked like, getting the operation started, to me.

"Q. Had they taken any coal out at the time? "A. They had some but it wasn't too heavy.

"Q. Do you remember how many men were there? "A. I would say there was enough to operate one strip shovel and a bulldozer, maybe a tippie man.

"Q. Do you remember what equipment they had? "A. I saw them move in the shovel there, or move it out to work on it, I am not sure which way they moved it. I did see a shovel and I think they had a bulldozer, and they probably had a loading shovel, a small one to load with.

"Q. Do you remember what date this was? "A. No, sir, I don't.

"Q. Do you remember what period of the year it was?

"A. No, sir, I can't confine it to that. "Q. Do you remember who was talked to up there? "A. I would say every time I stopped I talked to Jim Pennington.

1653 "Q. Do you remember what was said? "A. No, sir.

Q. How many times did you see Jim Pennington between that time and this time when you and Mr. Daniels came down and signed the men up? "A. Well, I don't know, Mr. Rowntree.

"Q. You don't remember? It has been some time ago. "A. It has been some time ago, and it is something that I never had to keep in my mind.

"Q. All right, Mr. Maddox, how many large mechanical mines are in this area that you have acted as a representative of the union in? "A. You mean then?

"Q. Yes, at the time you were a representative of the union in this ten-county area.

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1654 "A. The best I remember, we had three large mechanical mines in the Monterey area. Now that is strip, auger, and deep mines you are talking about?

"Q. That is right. And I am talking about mines that employ 50 men or more. "A. Yes. Well now, in Scott
1655 County—getting over across the line there—the others I am thinking about down the other way are small, Mr. Rowntree, and in Scott County we had a large strip mine up that fork there, and the mine at Glenmary was working. Mr. Gilchrist had a strip mine around Robbins there, and there were some over in near Williamsburg over there. Mr. Osborne had mines above there, up near Corbin. We had around Jellico, we had some big mines, and at Morley the mine was working at that time, and down at Caryville the Bledsoe people had two mines down there. I am liable to skip some, but a rough estimation I am giving you. The Hickey is pretty near Caryville. They operated that mine. Vaspar and Eagan over in Campbell County was operated by the Blue Diamond people at that time, and in the area of Williamsburg there I would say there were two or three more strippers. They were good productive places, maybe what you would like, but they didn't employ that many men. Over at Stearns, the Stearns people had two deep mines over there, also B. R. Campbell had a strip mine in that section, and there were four or five more strip mines of small type in Scott County at the time. I don't remember that fellow's name. We had a deep mine at Straight Fork.

"Q. That pretty well covers them? "A. There are more but it is hard to think them out right now, not being prepared on it.

1656 "Q. These three mines in Monterey you mentioned, what were their names, do you remember? "A. I will try to give you the names they operated on. Allred had one, Allred and Brown, A & B we call that. And the Fentress mine was operated by Fentress people, I will say, out of Knoxville. Then the mine Bill Turner Ray operated—I

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believe his last name is Ray — we called him Turner Ray.

"Q. That last mine you mentioned, is that the mine that was purchased by the Clinchfield Division of Pittston Company?" "A. That is right. That was the Bill Turner Ray mine.

"Q. That mine was still operating?" "A. Yes.

"Q. What about the Fentress mine?"

"Q. The Fentress mines were closed?" "A. Yes.

"Q. What about the A & B mine?" "A. I don't think it was operating. I heard it is subject to be started, but I don't believe it was operating.

"Q. Over in Scott County, you mentioned a large stripping operation. Whose stripping operation was it?" "A. McCoy's.

"Q. Where is he now?" "A. He left that section there, and I understand he is back in Alabama. He has an operation down there.

"Q. The Glenmary mine, do you know the present status of that mine there?" "A. No, sir, I don't. They were down and they may have gotten started. I don't know whether they are or not.

"Q. Does the United Mine Workers have a contract with them?" "A. No.

"Q. Did they have a contract at one time?" "A. Yes, sir, several years.

"Q. The Gilchrist operation at Robbins, is that in operation now?" "A. No. They moved from there. They went up about Jellico and operated up there after that.

"Q. Are they operating at Jellico now?" "A. I don't know. They may be. I can't answer that.

"Q. Does the United Mine Workers have a contract with them at Robbins?" "A. Yes.

"Q. Do they have a contract with Gilchrist or G & R now?" "A. I couldn't answer that. I don't know whether we have them signed up or not, or if he is operating.

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"Q. Now the Williamsburg — is that in Kentucky? "A. Yes.

"Q. You mentioned the Osborne operation near Williamsburg. That is Osborne Mining Company, is that right? "A. Yes.

"Q. Did you try to sign Osborne Mining Company up? "A. Yes, we tried to sign them up.

"Q. This was back before 1955, is that right? "A. Yes, sir.

"Q. And in 1955; 1954-1955, was Osborne Mining Company operating in the region of Jellico, Tennessee? "A. Yes, I guess they were. It must have been they were up at Gatliff at that time, maybe loading their coal.

"Q. Do you know what happened to that operation? "A. At Jellico?

"Q. Did they continue at Jellico? "A. No. They quit there and I think Gilchrist took their tippie over.

"Q. Gilchrist had a contract with the United Mine Workers at that time? "A. Yes."

1659 Mr. Kramer: Your Honor, I don't know the materiality. We let them go on with these. They take a lot of these individual mines and attempt to prove whether they are operating or not operating, without any basis of why or what may have happened, and I think it is wholly irrelevant and immaterial.

I have let them go on with it this far, but it is typical of some additional proof that they are seeking to prove, and we object to it as irrelevant and immaterial. The mere fact that the mine happened to be down and the circumstances surrounding it closing, I think it has nothing to do with it, your Honor.

Mr. Rowntree: We say the mines of Tennessee have closed and are closing because of conspiracy.

The Court: Overruled.

Mr. Kramer: Of course, your Honor, in that same connection I want the record to show — your Honor indicated it

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may show the reasons for our objection without repeating them, but you can't establish conspiracy by these acts themselves. The conspiracy must be shown by something outside the conspiracy before it is admissible.

(The reading of the deposition continued.)

"Q. You stated there were two or three more strippers operating around Williamsburg. Do you recall who they were? "A. A man named Bobo had a mine out there, and got killed in an airplane, and it changed hands to that county — what I mean, they set it up. I think one of the Penningtons did that under another hand there.

"Q. Any of those three strippers you mentioned, are they operating around there? "A. It is my knowledge, the best I have on it, that they are not. They are all out of business now.

"Q. What about the mine at Morley near Jellico? "A. Morley has worked out. They have pulled the inside equipment out. They did for a while operate the tipple and buy truck coal around there, but I understand they stopped doing that.

"Q. When was the last time you were down in that mine?

"A. That I was down in the mine?

"Q. Yes. "A. In Morley?

"Q. Yes. "A. I was in there one time when I was on safety. That was some time prior to 1952.

"Q. Were they worked out at that time? "A. No.

"Q. How do you know they are worked out? "A. I was told that by the superintendent that they worked it out."

"Q. That mine is closed? "A. That is right.

"Q. The Bledsoes operated two mines near Caryville, I believe you mentioned those. Do you recall what the names of those mines were? "A. We have a name for one of them; we called it Hickey, and the other Vaspar. But what the company names were that they operated under, I don't have them.

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"Q. That is good enough. Are those two mines operating?

"A. No.

"Q. The Campbell mine at Eagan, formerly operated by the Blue Diamond people, is that mine in operation? "A. It has been abandoned.

"Q. Did the United Mine Workers have a contract with that mine? "A. Yes.

"Q. Did the United Mine Workers have a contract with the Morley mine? "A. Yes.

"Q. That we talked about at Jellico? "A. Yes.

1662 "Q. What about the Hickey and Vaspar mines?

"A. We had contracts there.

"Q. The two deep mines at Stearns, what were their names? Do you recall what their names were? "A. Cooperative was one, and one was Blue Herron.

"Q. Where is that Blue Herron mine? "A. About 10 miles out of Stearns, back straight to the left as you get in town from the west.

"Q. And Campbell had a strip mine in that area? "A. B. R. Campbell did.

"Q. Is he still stripping over there? "A. I don't know whether he is or not.

"Q. Now, Mr. Maddox, how many small operating companies were operating in this 10-county area we have been talking about back when you were representative? "A. We named most of the large ones, and I would say that I had up around, Mr. Daniels and I did in this territory, had around 200 contracts.

"Q. That would be the balance of those? "A. That would be the balance of them.

"Q. Are there a good many small operators still in operation up there? "A. Well, they come and go. Sometimes they don't stay. There are several.

"Q. There are a number of small operations? 1663 "A. All over that territory, I would say yes.

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"Q. What size would these operations be that are operating up there, say, in the past two or three years?"

"Q. Mr. Maddox, will you sort of describe for us a typical one of those small operations, underground, in this area? How many men they would have? What they would do to get the coal out? I take it you have been there many times? "A. Well, they worked—there are different ways of working a mine, big or little, you work it on what they call shooting on the solid, or undercut the coal with a machine, then shoot the coal down, which is what they do where they have power. A man that didn't have any equipment would go in with his powder and drill and shoot on the solid and try to get a little coal that way, and probably get it in a car and push it out. A man with equipment would go in and take a machine and motor, and he would load this coal after it had been undercut with a machine, then, of course, he had to shoot it down, and lay tracks, and do that kind of work, and timber, and he would dump his coal maybe out in the tippie and it would be hauled away with a truck. I would say that would be a typical mine. That is roughly describing the two kinds."

"Do these small mines up in that area have conveyor belts? "A. They had one up there in Scott County, 1664 I know of, had a conveyor setup. It was above Robbins that I am thinking about. There are some more with truck transportation in the mines. That is, rubber-tired cars. They run a car on the track on rubber tires."

"Q. Where are they? "A. We have them up in Kentucky in Bell County there."

"Q. Have you been in any of those? "A. I haven't been inside in those mines. I have been to it, but I haven't been inside."

"Q. Have you seen any continuous mining machines in those small mines? "A. Not in small mines. They have them up at Lynch, which is the smallest in this area. They run about 15,000 tons a day."

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Mr. Rowntree: I think that should be "which is not in this area". Do you agree?

Mr. Kramer: Yes, that is right.

1665 "Q. Where is Lynch? "A. In Harlan County in Kentucky.

"Q. They have thicker coal than we have in this ten-county area? "A. Yes; the coal will average six feet, I expect, what I have seen of it.

"Q. Have you seen any of the really large stripping shovels that are in the industry at the present time? "A. No, only a picture of it. We don't have it in our field here. About a five-yard dipper is about the largest we have here. I understand some are fifty-five.

"Q. And have you got any of the great big trucks that they have in some of these other areas for hauling the coal with? "A. I would say just the average size truck is about all we have. We don't have any large ones.

"Q. Some of the roads at the strip pits are pretty muddy and rough? "A. Yes.

"Q. And the terrain pretty uneven? "A. Yes..

"Q. Did Mr. Bill Clontz previously operate as the union field agent in the area we are talking about before you came into it? "A. Mr. Clontz had part of the sec-
1666 tion that we have discussed.

"Q. What would be the average number of men that operated these small mines we have been talking about? "A. There is no average to it, I wouldn't say. I would say two up to twenty.

"Q. Two to twenty? "A. Maybe twenty-four or twenty-six.

"Q. Did the district president tell you each day what he wanted his field representatives to do that day?"

"A. No, we are not directed daily by the district president. We are given a section maybe that comprised several counties, and we were put out there to organize it, service the local union.

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"Q. What was your primary object as a field representative? Wasn't it to carry out the directions of the president of the district? "A. Yes, sir.

"Q. What did he tell you to do when you went out there? "A. I don't understand your question.

"Q. Was it to organize the unorganized mines? "A. Oh, yes, that is our job. We are supposed to organize, 1667 representatives of the union, and the union is in the organizing field.

"Q. He didn't tell you each day which mine to go to? "A. We were not directed that way."

"Q. Who was Ray Thomason? "A. He was district president.

"Q. And we are talking about when you represented— "A. District 19. Well, sir, I wouldn't say all the way through, but he was president.

"Q. And he was president in 1953 or 1954 and 1955, wasn't he? "A. He was sick there for about one year. I don't remember just the period. That would have to be excluded.

"Q. I will ask you then, did the district president assign you as a field agent of the union to the territory and leave it to you to outline your work in carrying on your duties as a representative of the United Mine Workers of America? "A. Yes. The answer would be yes on that. I would like to say a little more in explaining my answer. In some cases we would refer back to him for advice. He 1668 was, after all, the president of the district.

"Q. Was it your job, and were you instructed to attempt to organize any unorganized mines that might be in the territory? "A. We would find those places ourselves and just go ahead and try to organize them. We weren't sent and instructed there to do that. It was our job.

"Q. And the mines of John Jones or Joe Smith or Clifford Osborne were not specifically designated to you to

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go out and organize? "A. No. We weren't just sent to that one place to stay and organize it before we left. If that is what you are thinking.

"Q. Are most of the organizers of the United Mine Workers pretty experienced men in the labor organizing field? "A. I am not one to pass on their experience.

"Q. You know them very well, don't you? "A. Yes, I do.

"Q. And you know most of them have been in the business a long time, including yourself, in this particular field we are talking about in this period? "A. Yes, I would say they generally were experienced men.

"Q. The same is true for Mr. Daniels? "A. That 1669 is right.

"Q. It wasn't necessary for the district president to sit down with you and talk with you and detail your activities in your organizing work? "A. No, sir, generally it wasn't.

"Q. Now, Mr. Maddox, how did you go about this organizing? Suppose a mine could not be signed up by you and Mr. Daniels going and talking to the operators. Did you ever carry on picketing activities at these small mines we have been talking about? "A. Well, we never had a great deal of trouble at the small mines we are talking about. We never did a great deal of picketing.

"Q. Well, what do you mean by picketing, now? "A. Well, now, picketing and riding up and down the road in a car with a motorecade, in my view, are two different things. I say picketing, we would go there to the mine and we would peacefully picket the place according to the law.

"Q. And where would the pickets be situated? "A. No set rule on that.

"Q. Some of these mines are pretty isolated, aren't they?

"A. Yes, sir.

"Q. In wild territory? "A. Yes, sir.

1670 "Q. In the woods, is that right? "A. Some of those strippers get a way back.

Deposition of Taylor Maddox, Sr.

"Q. And some of the small deep mines are pretty far back in the hills, too? "A. Yes, sir."

"Q. Mr. Maddox, are you still a representative of the United Mine Workers? "A. Yes, sir.

"Q. You are still on the payroll of the United Mine Workers? "A. I hope so.

"Q. Now you have gathered together some men and gone in automobiles to some of these small mines from time to time, have you not? "A. In some cases. I don't just recall any specific incident. We would go to get the men signed up on checkoff card, or something like that.

"Q. Or to organize the mine? "A. Well, that would be organizing, signing up the man.

"Q. That was your job to organize the mines, is that right? "A. Yes.

1671 "Q. And when you would go on these trips sometimes you would pay for the gasoline on these trips?

"A. If I took a bunch of men and let them take their cars, yes, I would.

"Q. And sometimes you would buy food and things at the restaurant for these men, and pay the restaurant charge? "A. I think that is in the record that we have done that.

"Q. And you would get a refund on these expenses from District 19? "A. That would be organizing expenses."

"RE DIRECT EXAMINATION

"By Mr. Rayson:

"Q. Mr. Maddox, you referred to a number of mines by name or location during your cross-examination as being large, strip, auger, or deep mines. "A. Yes.

1672 "Q. Do you know as a matter of fact whether all of the mines you referred to had more than fifty employees, or did some of them have less than fifty employees? "A. Some of the strips would have less than fifty, and the auger mines would.

Testimony of I. E. Schmidt

"Q. So you did not mean to have your testimony understood that all those so-called large mines to which you referred had more than fifty employees? "A. No. That is a mistake, if that is the way it was understood. I believe I stated that the strip would have less. Did you understand that?"

"Mr. Rowntree: Yes."

1673

I. E. SCHMIDT

called as a witness by and on behalf of the defendants, cross-plaintiffs.

DIRECT EXAMINATION

By Mr. Robertson:

Q. What is your name? A. Schmidt. I. E. Schmidt. S-c-h-m-i-d-t.

Q. What was your occupation before your retirement? A. I was office manager for Royal Fuel Company at Knoxville.

Q. Did Royal Fuel Company submit bids for operating coal companies, mining companies? A. Yes, we did, to different locations.

Q. Did Royal Fuel submit bids for Phillips Brothers Coal Company? A. They did, yes.

1674 Q. Mr. Schmidt, could you tell what the factors are that would be considered in making—in determining the amount of particular bids which would be submitted by Royal Fuel on behalf of operating mining companies? A. What we took into—you mean what we took into consideration in making the bid to the TVA?

Q. Yes. A. The analysis of the coal and the freight rate, and the current price of coal you were paying for at different plants.

Testimony of I. E. Schmidt

Q. You mean the price of the successful bids just prior to that? A. The price of successful bidders prior to the date we put in the bid. Yes.

Q. Was your reliance on this substantial or not? A. We received from TVA weekly reports of their purchases for the preceding week on spot bid coal which gives the price they paid for the coal.

1675 Q. Was that for the plants which you submitted bids to? A. We considered only the Kingston and Watst Bar and John Sevier, the eastern plants.

Q. Did Phillips Brothers Coal Company ever authorize Royal Fuel to submit bids on the TVA term market? A. I was never authorized by Phillips Brothers to submit bid on term market; no, sir.

Q. But you did submit bid on the spot market? A. On the spot, yes, we did.

Q. Do you have copies of the Royal Fuel Records with you as pertains to Phillips Brothers Coal Company? A. I do. These are also my writings. I made these up for Royal Fuel.

Q. Does this record show the prices, the bid prices of— A. It shows the bid price, the commission and the net price paid to Phillips.

Q. Does it show the TVA contract number? A. Contract number, yes. And the bills of lading under which the coal was shipped and the car numbers of the coal.

Q. And also the destination of any other purchaser other than TVA? A. We show different purchasers, yes, 1676 sir, besides TVA.

Mr. Robertson: I wish to introduce this as the next exhibit, being the Royal Fuel Company records pertaining to Phillips Brothers Coal Company beginning March, 1956, and going through December, 1958, as a collective exhibit.

(Exhibit No. 97 was marked for identification and filed.)
By Mr. Robertson:

Q. I will ask you, Mr. Schmidt, to look at the column showing the net price to Phillips Brothers and ask you

Testimony of I. E. Schmidt

if there is any trend so far as the price received by Phillips Brothers from TVA? A. During the years 1956, '57—

Mr. Kramer: Wait just a moment. I understand this instrument speaks for itself. What are we seeking to do now, Mr. Robertson?

Mr. Robertson: All right, your Honor. I would like to read these net prices then.

This is beginning in March, 1956, and I would like to point out for clarification, that there is a gross price and then the commission which Royal Fuel charged Phillips Brothers for submitting the bids and then it shows the net price paid by Royal Fuel to Phillips Brothers out of what it received from the TVA.

1677 In March, 1956, to TVA, price \$4.15 a ton. April, 1956—

The Court: Was that net or did that include the commission?

Mr. Robertson: That is net.

The Court: Net to Phillips?

Mr. Robertson: That is net to Phillips.

The Court: All right.

Mr. Robertson: On that particular one the gross price was \$4.49, the net price was \$4.15 per ton.

1678 By Mr. Robertson:

Q. To clear this up, Mr. Schmidt, what account books of Royal Fuel do these come from? A. These are accounts payable.

1679 Mr. Robertson: That first one in April was April 19th.

Again April, April 21st, gross price \$4.49; net price, \$4.15, to TVA.

April 27, the gross price, \$4.49; net price, \$4.15, to TVA.

May 19th, Gross price, \$4.49; net price \$4.15, to TVA.

1680 That first figure was May 9th. This is May 14th. Gross price \$4.49; net price \$4.15, TVA.

Testimony of I. E. Schmidt

May 18th, gross price, \$4.49; net price \$4.15, TVA.

May 23rd, gross price, \$4.49; net price, \$4.15, to TVA.

June 7th, gross price \$4.30; net price, \$4.05, to TVA.

June 5th, gross price, \$4.30; net price, \$4.05, to TVA.

June 8th, gross price, \$4.30; net price, \$4.05, to TVA.

June 13th, gross price, \$4.30; net price, \$4.05, to TVA.

June 15th, gross price, \$4.30; net price, \$4.05, to TVA.

June 19th, gross price, \$3.85; net price, \$3.65, to TVA.

June 20th, gross price, \$3.85; net price, \$3.65, TVA.

June 22nd, gross price, \$3.85; net price, \$3.65, to TVA.

June 27th, gross price, \$3.85; net price, \$3.65, to TVA.

July 14th, gross price, \$3.85; net price, \$3.65, to
1681 TVA.

July 20th, gross price, \$3.72; net price, \$3.52, to
TVA.

July 24th, gross price, \$3.72; net price, \$3.52, TVA.

July 26th, gross price, \$3.72; net price, \$3.52, TVA.

August 1st, gross price, \$3.72; net price, \$3.52, to TVA.

August 9th, gross, \$3.72; net, \$3.52, TVA.

August 13th, \$3.72 gross; net, \$3.52.

September 5th, gross \$3.60; net, \$3.45, TVA.

September 10th, gross, \$3.60; net, \$3.45, to TVA.

September 12th, gross, \$3.60; net, \$3.45, to TVA.

September 13th, gross, \$3.60; net, \$3.45, to TVA.

September 14th, gross, \$3.60; net, \$3.45, to TVA.

September 15th, gross, \$3.60; net, \$3.45, to TVA.

September 21st, gross, \$3.52; net, \$3.37, to TVA.

September 26th, gross price, \$3.52; net price, \$3.37,
1682 TVA.

September 27th, gross, \$3.52; net, \$3.37, TVA.

September 28th, gross, \$3.52; net, \$3.37, to TVA.

October 3, gross, \$3.52; net, \$3.37, to TVA.

1683 To make this more brief, September 21, the figure
changed gross \$3.25 and net \$3.37; and at that price
there are seven combined entries or seven entries at that
figure.

Testimony of I. E. Schmidt

November 2, gross \$3.62. Net \$3.47, to TVA. And there are three entries at that price.

Then December 4, gross \$3.25. Net \$3.37 to TVA, and there are four entries at that price, going through February 1957.

March 12, 1957, gross price \$3.57. Net \$3.42 to TVA, and there are four entries there, through the rest of March at that price.

Then the next entry is August 8, 1957, and this coal is Love & Amos Coal Company on it, the destination being Tampa Electric Company. The gross price on that is \$3.75. The net price is \$3.50.

Mr. Kramer: Now, your Honor, we are going to object that the sales to TVA were competent — the fact that they sold coal at a certain price to the Tampa Electric Company, your Honor, and we are showing simply that they sold coal at a certain price and received a certain net amount per ton for the coal sold to Tampa Electric Company. The fact that they made sales to some concern at a given price we do not think is evidence of any conspiracy or acting 1684 within any conspiracy that could be competent in this lawsuit, and we object to it as being irrelevant and immaterial.

Mr. Robertson: Of course, your Honor, we are showing here the fact that the price of the coal going to Tampa at that time was above the price that they could get at TVA.

The Court: Is that the only purpose of the testimony?

Mr. Rowntree: If your Honor please, there will be some testimony a little bit later about Tampa Electric Company and what these people did down there.

The Court: Well, is the only purpose of this testimony so far is to show that the price paid by Tampa was a price higher than paid by TVA?

Mr. Rowntree: It is also offered for the purpose that we had a market in Tampa, a market that we very much needed and a market which has been taken away from us.

Testimony of I. E. Schmidt

The Court: Overruled.

Mr. Kramer: If I may state, your Honor, I can't see what difference five cents a ton, or whatever the amount may be—suppose they had a market and Tampa Electric is 1685 willing to pay a little more. I can't follow where this is competent and relevant.

The Court: Mr. Kramer, it may have some bearing. The Court is not indicating what bearing, if any, it has on this monopoly feature of the lawsuit. Under Section 2 of the Sherman Act, the charge is made that these defendants, along with some of the large coal companies, combined to monopolize or to attempt to monopolize the market in the coal industry.

Now this testimony, the Court is not indicating it is of probative value, if any, but the Court does feel that it should be admitted as bearing on that subject, for whatever weight it may have, if any. That is the theory upon which the Court holds that the testimony is competent.

With that explanation, the objection is overruled.

Mr. Robertson: The first entry here was August 8, at the price of \$3.75 gross and \$3.50 net to Tampa, and there are 13 entries going through the month of September, 1957, at the same prices, that is \$3.75 and \$3.50 to Tampa.

Beginning with October 12, shipments to TVA, gross price \$3.05. Net price \$2.90, TVA. There are five entries at that price to TVA.

1686 On November 4, 1957, to TVA, gross price \$2.98.

There are four entries at that price up until the latter part of November and on November 26, 1957 the gross price to TVA is \$2.95, the net \$2.80.

There are four entries there going through December '57 at those prices.

Beginning January 3, 1958, coal to TVA, gross price \$3.07. Net price \$2.92.

The Court: Gross how much?

Testimony of I. E. Schmidt

Mr. Robertson: \$3.07. There are five entries at that price, going through January 1958.

Beginning with February 7, gross price \$3.18. Net price \$3.03, to TVA. Eight entries at that price go into April of 1958, and then on April 21, 1958, gross \$3.20. Net \$3.05 to TVA. There are six entries at that price of coal going to TVA into May 1958, and on May 27, 1958 coal going to Love & Amos on the Tampa contract, the gross price \$3.75. Net \$3.50. Then on May 22, an entry on TVA coal at the gross price of \$3.20. Net \$3.05.

Mr. Kramer: Tampa Electric, we are still continuing subject to our objection, without repeating.

The Court: Yes.

Mr. Robertson: On June 2, 1958, coal to TVA, gross price \$3.19. Net \$3.04. There are eight entries at that price, and then on July 14, 1958, gross price to TVA \$3.15. Net price \$3. There are three entries at that price, until 1687 July 21, 1958, coal going to Love & Amos from the Tampa Electric—one the Tampa Electric contract, entry July 21, 1958, gross price \$3.75. Net price \$3.50.

July 30, 1958, upon coal going to TVA, gross \$3.44. Net \$3.15. There are two entries at that price.

Then on August 8, 1958 to Duke Power Company the gross price \$3.65.

Mr. Kramer: The same objection with reference to Duke that we made with reference to Tampa Electric.

The Court: Same ruling.

Gross how much?

Mr. Robertson: Gross \$3.65. Net \$3.30.

And the balance of 1958 is to Duke Power Company at the last price I gave. That is the gross of \$3.65. Net \$3.30. With the exception of one entry on September 27, which appears to be Kentucky Cumberland Coal Company at a gross price of \$3.75 and a net price of \$3.30.

* * * * *

Testimony of I. E. Schmidt

1689 By Mr. Robertson:

Q. Mr. Schmidt, have you analyzed the spot award announcements by TVA for the years 1956, '57, and '58, and made any charts as to what those awards sheets show? A. I have, yes, sir.

Q. I'll ask you have you prepared a chart showing the bid activities, bidding activities, of Phillips Brothers Coal Company during the years '56, '57, and '58? A. Yes, sir.

Q. And what does that chart show? A. That chart shows the date of the bid, the bid number, the bid price, the commission, and the net price to Phillips Brothers, and the plant to which the coal was sent. It also compares the average spot bid price at this plant at that time.

Is that clear?

Q. All right, now, from what records were these figures taken? A. From the photostatic copies of the TVA.

Q. And did you use any other records other than 1690 these to make these charts? A. I used the sheet, a certain part of this sheet over here that you just read.

Q. What columns there did you take from the Royal Fuel— A. That is on the bid price, the commission, and the net price.

Mr. Robertson: We offer this first chart, Your Honor, as Exhibit—as the next exhibit, comparing the Phillips Brothers Coal Company bidding activities with the average prices paid at the particular TVA steam plant that month with the price Phillips Brothers received on their bid on that particular month for the years '56, '57, and '58.

Mr. Robertson: For purposes of clarification, Your Honor, I believe I used the term "price" a few minutes ago, and actually, it is "cost per million BTU's" on both the Phillips Brothers activity and the averages as reflected on these TVA awards for all companies.

Mr. Kramer: Are you talking about cost to TVA, is that

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what you mean when you use the word "cost"?

1691 Mr. Robertson: Cost to TVA.

Mr. Rowntree: We want to show, Your Honor, that Phillips Brothers wasn't underbidding the market just to sell coal. It was bidding at a figure that is pretty close to the market average in order to stay in the market, and it was not damaging itself by bidding too low or way below the market price. That is the purpose of that.

Mr. Kramer: Of course, it is our position that the market had to be met, or it couldn't operate. Market price cannot be a basis for conspiracy. If the market goes down on anything, you have to take the consequences. If the price of shoes goes down, I pay less for the shoes. TVA did the same when it bought coal.

(Exhibit No. 98 was marked for identification and filed.)

Mr. Robertson: If Your Honor please, I would like to read from this exhibit beginning with March, 1956. I have already read from the Royal Fuel records some of these figures, and so I will omit the prices, commission, 1692 and so forth, and the contract number, and read it only by months, tons which Phillips Brothers either offered or were awarded, the cost per million BTU to TVA on that award, and the average BTU cost to TVA for all the awards for that month at that plant.

Beginning with March, 1956, a successful bid, or an award to Phillips Brothers for six hundred tons, at the cost of .2349—that is twenty-three cents carried out to the fourth place, .2349—that is true of all of these figures. They carry them out to the fourth place.

The Court: That is the price of twenty-three and a half cents?

Mr. Robertson: Yes, sir.

The average at Kingston that month—

Mr. Kramer: You mean that was a Kingston sale?

Mr. Robertson: That was consigned to Kingston.

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Mr. Kramer: All right.

Mr. Robertson: The average to Kingston that month for all awards, all spot awards, was .2303.

April '56, an award to Phillips Brothers of one thousand tons at .2349, to Kingston, the average for all awards, spot awards, at Kingston that month, .2343.

May, 1956, fifteen hundred tons to Phillips Brothers, 1693 ers, .2349, at Kingston, the average at Kingston, .2335.

June, 1956, fifteen hundred tons to Phillips Brothers at .2373, the average at Kingston that month, .2152.

Another award in June of fifteen hundred tons at .2094, and the average at Kingston that month, .2152.

July, 1956, fifteen hundred tons to Phillips Brothers at .2042, to Kingston, the average at Kingston that month, .2049.

August, 1956, fifteen hundred tons to Phillips Brothers, to Kingston, at .1994, the average at Kingston that month, .2006.

September, 1956, one thousand tons, to Kingston at .1962, the average at Kingston that month, .1950.

In October, 1956, one thousand tons offered but was not awarded at .1947, the average that month at Kingston, .1944.

December, one thousand tons awarded to Kingston at .1952, the average at Kingston that month, .1943.

November, '56, one thousand tons awarded, .1967, cost to Kingston, the average cost at Kingston that month, 1694 .1954. January, 1957, one thousand tons offered, but not awarded, the cost at Kingston, .1940, the average at Kingston that month, .1955.

Also offered to John Sevier at .2021, the average at John Sevier that month, .2030.

In March, 1957, one thousand tons awarded to John Sevier at .2043, the average cost at John Sevier that month, .2022.

One thousand tons offered in March but not awarded, to Kingston at .1962, the average at Kingston .1904.

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To John Sevier, 2043, the average at John Sevier that month, 2022.

April, 1957, four hundred fifty tons awarded at Kingston at 1849, the average at Kingston that month, 1870.

Also in April, five hundred tons awarded at 1851 to Kingston, the average that month at Kingston, 1870.

May, 1957, fifteen hundred tons awarded to John Sevier at 1933, the average cost at John Sevier that month, all spot awards, 1968.

In May, fifteen hundred tons awarded to John Sevier at 1953, the average at John Sevier that month, 1968.

1695 In June, 1957, fifteen hundred tons awarded to John Sevier at 1933, the average that month, 1962.

July, 1957, fifteen hundred tons awarded to John Sevier at 1990, the average that month at John Sevier, 1973.

August, '57, twenty-five hundred tons awarded to John Sevier at 1912, average that month at John Sevier, 1920.

September, 1957, five hundred tons awarded to Kingston at 1770, the average at Kingston that month, 1796.

October, fifteen hundred tons awarded to John Sevier at 1831, the average at John Sevier that month, 1857.

1696 By Mr. Robertson:

Q. Mr. Schmidt, I believe I neglected to ask you, how long you were with Royal Fuel Company, from what date to what date? A. I was with them in the spring of 1951 until August, 1959.

Q. To August of ----- A. 1959.

Q. During the years 1956, '57 and '58, while you were with Royal Fuel Company, was there any pattern which you noticed in the TVA market? A. Seemed that the TVA market was on the decline pretty bad, especially '57, '58.

Q. Did you know why this decline ----- A. No. At that time we did not know.

1697 Q. Since you have recently had access to the TVA award announcements, the spot award announce-

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ments, have you also constructed a chart which would compare the average BTU cost of the eastern plants, steam plants of the TVA, with the average BTU cost of the TVA system as a whole? A. Yes, I have.

Q. Do you have that chart? A. I have that chart, yes.

Q. And from where did these figures come? A. They come from the photostatic copies of the TVA reports.

Q. Do you know which steam plants are in the eastern section of the system and which ones are in the western section? A. In the eastern section they have -- we cover Kingston, John Sevier, Watts Bar, and in the western section it covers the Shawnee, Johnsonville, Colbert, 1698 Gallatin and Widows Creek.

Q. All right, and are the award announcements in the spot made according to east or western plants? A. Yes, they do. They distinguish between eastern and western plants.

Mr. Robertson: We offer this as the next exhibit, which shows the average BTU cost per month at the three TVA eastern steam plants. That is the average for all three of the plants, Kingston, John Sevier and Watts Bar, as compared to the average BTU cost per month of the coal purchased for the TVA system. That is the average of all of the steam plants. And this chart also shows what that average is per year for the eastern as compared with the TVA system, and this chart covers the years 1956, '57, and '58.

Mr. Kramer: May it please the Court, we object to the introduction of this exhibit. In the first place, your Honor has already heard the proof that the difference between the locations of the east plants -- east Kentucky plants so-called, the west Kentucky plants so-called -- has an effect on the BTU's, your Honor, the delivered price. Your Honor recalls that testimony.

This does not take into consideration, in an attempt to make a comparison, you don't have here a showing as to distance -- that is, the transportation

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cost — at all. And these figures would be absolutely valueless.

It does not take into consideration, your Honor, as Mr. Hill said this morning, the manufacturing cost, which is the type of machinery. Some of these TVA plants are more modern than others, therefore they require less fuel than others require. And they are wanting to compare here the BTU cost in an antiquated plant and an antiquated history of electrical development of 10 or 12 years ago and some very recently constructed modern plants where the cost of production would be much less than under the older systems and older machinery than can be produced in a more modern plant.

They are trying to compare modern plant to an old plant and between the east and west with transportation costs different and many elements in a comparison of that kind to get the BTU cost for a plant in the east and in the west Kentucky plant. And we say it is irrelevant, immaterial, prejudicial and has no probative value in this case.

The Court: What is the purpose of this testimony?

1700 Mr. Robertson: The chart shows a pattern of the cost per BTU for the coal acquired by the TVA during those three years.

It is our contention in this case that large tonnages at cheap prices were being dumped on the western end of the TVA system, and we have shown by the testimony already of the TVA officials that this is an integrated system and that they do compare prices in order to know which production to speed up at one plant and slow down at another.

It is our contention that the prices of this cheap coal being dumped on the western end of the market dragged the entire TVA market down during these three years.

Mr. Kramer: May I state this, your Honor. Mr. Hill this morning testified in this deposition that in order to ascertain the BTU cost you had to take into consideration the type of machinery — the machinery they had in all of these plants, and therefore you couldn't say that the sole

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difference in cost was due to the fuel difference. Therefore, your Honor, there are large differences between the east and west plants — the condition of the plants is so much different, and that has to be taken into consideration in determining the effect on coal prices.

1701 The Court: The Court is of the opinion that the objection goes to the weight of the testimony rather than the competency, and therefore the Court overrules the objection.

Go ahead.

* * * * *

Mr. Robertson: I offer this as the exhibit previously described, the chart as the next exhibit.

(Exhibit No. 99 was marked for identification and filed.)

Mr. Robertson: I won't read this entire chart but I might point out the average BTU cost per year for the TVA eastern plants in 1956 was .2103; the average BTU cost per year for all TVA steam plants for 1956 was .1971.

In 1957 the average BTU cost for the eastern
1702 plants was .1908 cents, a decline there of almost a cent and a half. For the TVA system the average BTU cost for 1957 was .1848. In 1958 the average BTU cost for the eastern plants was .1878 cents. The average for 1958 for all TVA steam plants was .1779. A decline in each of those years from 1956.

I will ask that this be passed to the jury.

(The exhibit was passed to the jury.)

This, I might point out, is again the spot coal market.

By Mr. Robertson:

Q. Mr. Schmidt, have you taken from these TVA awards, spot award sheets, the total tonnages purchased on spot bids for each of the years 1956, '57 and '58 for the eastern steam plants as compared to the western steam plants? A. I have; yes, sir.

Mr. Kramer: We are going to continue our objection for the same reasons. We all know, it is a matter of common

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knowledge, that of course a concern operates its more efficient plants. The Aluminum Company does that — and operates its older, lesser efficient plants the lesser number of days and perhaps uses a lesser amount of fuel, and this doesn't prove anything at all, and we object to it and 1703 to its introduction for any purpose whatsoever.

The Court: Same ruling.

Mr. Robertson: I offer this as the next exhibit. It contains for the years 1956, '57 and '58 total tons per year purchased by TVA for its eastern plants as compared with the total tons purchased for its other plants.

(Exhibit No. 100 was marked for identification and filed.)

Mr. Robertson: This again, your Honor, is the spot market.

The total tons for the eastern plants in 1956 were 2,074,061 tons.

In 1957 that declined to 1,605,384.

In 1958 that declined to 1,478,651.

For the western plants in 1956, 1,906,490 tons were purchased for the western plants. That figure was increased in 1957 to 2,549,001 tons.

In 1958 the western total tons for the western plants was 2,506,588.

I ask that be passed to the jury.

(The exhibit was passed to the jury.)

By Mr. Robertson:

Q. Have you gone through the TVA spot award announcements to find what operating companies bid 1704 tonnages of 10,000 tons or more on the TVA spot market for the years 1956, 1957 and 1958, and have you made a chart of the bidding activities of these companies? A. Yes, I have.

Q. And what charts do you have there? A. Three.

Q. How many charts, three charts? A. I have three charts, yes, sir.

Q. Just describe what companies are on the chart designated 3A? A. The Chart 3A covers the Pittsburgh-

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Midway mines. It covers the Paradise Mine, the Colonial Mine. The Peabody mines, it covers the Vogue Mine, Skibo Mine and Graham Mine.

Q. Do you find any pattern there? A. There is a downward trend.

Mr. Kramer: I don't know what you mean by "pattern". What do we mean by "pattern"?

The Court: I don't know, but I think we ought to get this — you are going to file this in the record?

Mr. Robertson: Yes.

The Court: I think it ought to be gotten in the record, and instead of referring to it as 3A it ought to be referred to as the exhibit number.

1705 Mr. Robertson: I will ask then that the three charts be filed, not collectively, but as individual charts or exhibits.

The first chart shows the bidding activities in terms of tons of 10,000 tons or over and the BTU cost of those bids and awards for Pittsburgh & Midway Coal Company and Peabody Coal Company for the years, 1956, '57 and '58.

Mr. Kramer: Before we file this, are we talking
1706 about spot or term bid?

Mr. Robertson: That is spot.

Mr. Kramer: Wait just a minute.

The Court: Is that the exhibit to which his testimony refers at the present time?

Mr. Robertson: Yes.

The Court: You have heretofore referred to as 3-L?

Mr. Robertson: Yes, your Honor.

(Exhibit No. 101 was marked for identification and filed.)

Mr. Robertson: The next chart that we offer as an exhibit —

Mr. Kramer: Before you pass from the other one, your Honor, I will call attention that this is not in the field at all where Phillips Brothers were interested. This is in the west Kentucky field, and we continue our objection as being irrelevant and immaterial for any purpose.

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The Court: Overruled.

Mr. Kramer: In addition to the other objection:

Mr. Robertson: The next chart shows the bidding activities, which shows both the awards and the unsuccessful bids of West Kentucky and Nashville Coal companies for the years 1956, '57 and '58, broken down by mines, the Atkinson mine, the Homestead mine, the East Diamond mine, and the Uniontown mine.

Mr. Kramer: These are all still in the west field, your Honor, and we continue our objection.

(Exhibit No. 102 was marked for identification and filed.)

Mr. Robertson: And the third chart we offer is the bidding activity for the years '56, '57 and '58 of DeBardelben Coal Corporation and Truax-Traer Coal Company.

(Exhibit No. 103 was marked for identification and filed.)

Mr. Kramer: Your Honor, I want counsel to state the purpose. These people aren't claimed to be conspirators in this field at all. No averment or allegation of it. We don't want to take every coal company in the country — that is something else. We object.

Mr. Robertson: Your Honor, the witness has gone through these spot awards, and all three of these charts are on the spot market, and picked out the companies that have bid 10,000 tons or more. In other words, large tonnages on the TVA spot market, operating companies, and have made charts of their activities. These last two companies to which Mr. Kramer refers happen to be two operating companies, other than the conspirators charged, who bid large tonnages.

Mr. Kramer: May I ask a question? When you say 10,000 tons or more, are you figuring on a single bid and were a single award, or are you figuring a group of bids taken together and added up to 10,000?

Mr. Robertson: Single bids and single awards.

Mr. Kramer: We continue the objection, your Honor.

Mr. Rowntree: If your Honor please, it is our position

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that this spot coal market had some limitations. It wasn't a very big market. It is the market that was left after Walsh-Healey to the small company that could not pay Walsh-Healey wages. The market amounted to roughly five million tons a year for the whole system; that a 10,000 ton bid, bid repeatedly, was a large bid on this market and had effect on the market, and that is why we picked out the 10,000 ton bids, the big bids.

The Court: Well, what relation do you contend that that ten — ten what?

Mr. Rowntree: Ten thousand tons.

The Court: Ten thousand ton bid had to the Phillips Brothers Coal Company? What was the relationship, causal connection, if any?

Mr. Rowntree: Our client was selling on the spot market. We have shown the drastic decline in that market in the period '56, '57, '58. We say something was happening to that market. We are trying to show here what was happening.

We believe that the proof will show that there is a dumping of coal in large amounts by certain companies on the spot market. We pick out those tonnages — the witness has — and the next question is, is there any pattern or trend or is there a showing of declining price, one right after the other.

We are getting at the question of cutting prices on the TVA spot market, and the effect on that market, and we have shown the effect on our client and his price already.

The question is whether or not there was a wilful intention to depress this relatively small TVA spot market, which was participated in by those producers who could not pay the Walsh-Healey wage.

Mr. Combs: May it please the Court, of course your Honor knows we don't accept the proposition that the Walsh-Healey Act prevented anybody from selling coal to

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the TVA or government activities. I might also
1710 point out that the 10,000 ton range has got nothing
to do with selling to Walsh-Healey. It is dollars in-
stead of tonnages.

I don't think just because somebody didn't sell coal, just
to say that they weren't able to sell it because they couldn't
pay the wage scale. We get back to the proposition that
the Walsh-Healey Act did not set a minimum scale; it set
a prevailing wage scale that it found in the industry, and
that is the only requirement under Walsh-Healey, that they
do pay the prevailing wage scale as found by the Secretary
of Labor.

Mr. Robertson; I think, your Honor, you will find that
the companies, if they don't pay this wage, and they do sell
to a governmental agency, over \$10,000 worth, that they do
have to go back and pay back wages.

Now you can call it a minimum wage or anything else,
but it actually works as a minimum wage.

Mr. Combs: Well, I just want to point out, your Honor,
that it is not a minimum wage under the law. Actually the
impression gets around sometimes that the Walsh-Healey
Act set some kind of a wage scale under the order. That
isn't true at all. The purpose of the Secretary of Labor in
having the hearings is to determine what wages are
1711 paid. It has nothing to do with the minimum. It be-
comes a minimum to people who sell the products to
the government, that is true. But they set the areas, they
set the industry, they name the product, and then from that
they go and find out from evidence what wages are the pre-
vailing wage scale in that industry, and I think it is mis-
leading to say that it is a minimum scale that somebody has
to pay, if they are going to deal with Walsh-Healey, as if
it is the government or somebody else at fault if that hap-
pened to be the wage scale in the industry.

Now there is one more thing that I wish to point out —
for the first time, we have found that the DeBardeleben
Coal Corporation and Truax-Traer Coal Company are in

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here and say that they are investigating their activities to see if they had something to do with it.

Mr. Robertson: The testimony will clear this up, if we can go into these charts, your Honor.

I would say this on Mr. Combs' statement there, the statement of the Secretary of Labor is already in this record that the minimum wage was set under the Walsh-Healey Act for the purpose of running these smaller companies out of business. That is already in the record.

1712 Mr. Combs: I don't want to quibble on words, but

I think even the proof he is talking about, the secretary was talking about a prevailing wage. That is what the law says, that is what the facts state, that is what the order recites, that that is the finding of the secretary, that this is the prevailing wage.

Mr. Kramer: And not the minimum wage.

Mr. Combs: And certainly is not the minimum wage. It is not the average wage. It is the prevailing wage. It is not the average wage. It is the prevailing wage in the localities that they designate for the particular area that they are talking about.

Mr. Rowntree: If your Honor please, we have already in the record the statements of Mr. Lewis severely criticizing the TVA for carrying on the spot market. He said it was an evasion of the Walsh-Healey Act, whereas the law is clear that it was very proper procedure for the TVA to follow.

Mr. Lewis made a speech, which we have read into the record sometime back — several days ago.

Also the meaning of TVA to reduce that spot market. There is pressure on TVA to eliminate this market which was left available for these small coal companies that are left in Tennessee. And here we are seeing what they
1713 are doing to the price on the spot market. That is the purpose of these charts.

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1714 The Court: I overrule the objection.

By Mr. Robertson:

Q. Mr. Schmidt, looking at Exhibit 101, the exhibit covering the activities of Pittsburgh and Midway and Peabody Coal Companies, is there any pattern or trend? A. There is a slight trend — —

Mr. Kramer: We object.

The Court: Mr. Kramer wanted you to explain to him what you mean by pattern, the word "pattern".

Mr. Robertson: I mean by that, your Honor, whether or not there is any trend either up or down in the cost per million BTU that these companies were offering their coal to the TVA. Are they offering it at progressively lower prices or progressively higher prices. Is there any trend or are they high one time and low the next time and so forth.

1716. Mr. Robertson: All right. I can do it by briefly—

I was wanting to get around as much of this as possible, but I will run down through this briefly.

I point out that the Paradise Mine of Pittsburgh-Midway Coal Company, in January, '56, the coal offered and actually awarded from time to time to the Johnsonville Plant of TVA, January, '56, it was .1786, and over that three-year period—

The Court: Now, .1786 per what?

Mr. Robertson: Per million BTU. That is a little more than seventeen and three quarters per million BTU.

Mr. Kramer: Seventeen cents and eight-tenths mills.

The Court: Well, we have got enough trouble without getting into mills.

Mr. Kramer: I agree with Your Honor.

Mr. Robertson: Anyhow, the cost of million BTU went from .1786 in January, 1956, to .1683 in December, 1958, and I will just point that one out. They are that way throughout the activity.

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I will pass this exhibit to the jury.

I point out again that these charts cover only large tonnages, ten thousand tons or more, and it is all on the 1717 spot market.

Mr. Kramer: I point out, Your Honor, that it refers to a particular company, or two or three companies that are listed on there. Trends in the market, Your Honor, cannot be proved, as I understand the rule, by prices by one particular, or two or three particular companies.

If we are trying to get into the rule of trends in the market, you have got to go broader than one, two or three companies. We object to it, as being incompetent for that reason, Your Honor.

Mr. Robertson: We are showing the costs at which these companies were offering coal to the TVA and these are companies charged as being conspirators.

The Court: Overrule, go ahead.

Mr. Robertson: In Exhibit 102, the bidding activities of West Kentucky and Nashville Coal Companies, broken down by mines, and I will point out here as an example of the tonnages and the price decline, just the Uniontown mine here, in September, 1957, they offered sixty thousand tons to Shawnee at .1675. Large tonnages, anywhere from eighteen thousand to sixty thousand tons were offered throughout the period and the cost per million BTU goes from September of '57 of .1675, to .1586 in April, 1958.

1718 By Mr. Robertson:

Q. Mr. Schmidt, is there any—what is the significance?

A. The underscoring means they were given the contract, and not underscored, they were not.

Mr. Kramer: In other words, those underscored were given the contract, and those not underscored, regardless of whether they were above or below did not get the contract?

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The Witness: That's right.

Mr. Kramer: Only the ones underscored were awarded the contract on these figures?

The Witness: That's right.

Mr. Robertson: The Exhibit 103, covering the DeBardeleben Coal Corporation and Truax-Traer Coal Company for the years, 1956, '57, and '58, we point out that the cost per million BTU of the coal offered to TVA through that period were extremely high—

1719 Mr. Kramer: We object to that comment "extremely high", Your Honor.

The Court: Sustained.

Mr. Robertson: To Colbert, they offered at the price of .3176 in January, 1956, per million BTU, and those costs increased to .3501, and finally in April, 1957, the DeBardeleben ceased to offer any coal to TVA. The last bid was ten thousand tons at .3735 offered to Culvert.

Truax-Traer offered coal in March, 1956, ten thousand tons to Shawnee at .1997, and the cost of the coal which they offered to TVA increased during that period.

Now, I would also point out to the jury that with both of those companies bidding during that period, neither one of them received awards on their bids.

By Mr. Robertson:

Q. Mr. Schmidt, have you gone through the TVA term award sheets? A. Yes, sir.

Q. For each of the years, 1956, through October, 1960?
1720 A. Yes, sir.

Q. And have you picked out the companies which we have charged with being conspirators in this case and made a chart in regard to their term contracts? A. Yes, sir.

Q. I ask you what the term—the information on the term contracts on that chart, what are they compared to?

Mr. Rayson: Your Honor, we are going to object to the introduction of any evidence concerning term contracts. To

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introduce information about term contracts here in relation to Phillips Brothers Coal Company is like comparing cheese and chalk. Phillips Coal Company wasn't in the term market. Evidence could be introduced showing that the partner of this company, Royal Fuel Company, said that never in his experience in representing Phillips Brothers Coal Company, long prior to 1955, that he ever submitted a term bid for them. They weren't equipped to handle that.

The Court: Well, your objection would be good on the question of alleged damages sustained by Phillips Brothers, but would it be good as bearing on these other questions? Isn't it a part of the whole picture, this term contract?

Mr. Rayson: Your Honor, we think that it is just
1721 an entirely different business, the term business. In order to bid on a term contract, a company would have to have reserves known to itself to deliver coal for at least a six-months period, for at least a thousand tons a week. This company simply wasn't in that category. It couldn't see in the term market, had it had any intention of doing so, and therefore, we say that this information is of no relevancy in this case.

The Court: It is not on the question of damages, the Court so holds.

Mr. Rayson: and we think that it goes beyond the questions of damages, Your Honor.

* * * * *

The Court: The Court holds it is competent evidence on the conspiracy phase of the case, but is it your con-
1722 tention that the Phillips Brothers could have ever made term bids, or that they could have ever gotten into the term market?

Now, if it is, then the Court will change its ruling on the damage phase of the lawsuit. The Court has held, insofar as the Court can see at the present time, it has no bearing on the question of damages, because Phillips Brothers were not in the term market.

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Mr. Robertson: Of course, Your Honor, I can't speculate as to whether or not they would have been had the Walsh-Healey not gone through in October, 1955. My own personal opinion is I see no reason why they couldn't have been in the spot market, but—

The Court: Well, up to this point, the Court sustains the objection as to the testimony bearing on the damage phase of the lawsuit. The Court cannot see at the present time how such testimony could have any probative value on the question of damages since it is not shown up to the present time, so far as the Court can determine, that Phillips Brothers was in the term market.

Now, if it later appears that Phillips Brothers were in the term market, or that they were prevented from going into the term market on account of the alleged wrongful 1723 acts of one or more of the defendants in this case, then the Court will reconsider its ruling on that point.

Now, if you object on that point, Mr. Rowntree, if you have any evidence on the question as to whether or not Phillips Brothers intended to, had the potential of getting into the term market, then the Court will reconsider its ruling on that point, but unless there is some proof on that question, then the Court holds that it is not competent on the question of damages.

Mr. Rowntree: I don't think our people ever got around to anything about the term market, Your Honor.

The Court: All right; then, it is too remote on the question of damages. The Court holds to its ruling on that point.

Mr. Robertson: We ask that this chart be introduced as the next exhibit. It covers the years 1956, '57, '58, '59. This chart shows the company awarded the term contract, the destination—that is the TVA steam plant to which the coal was consigned—the term, the tons per week to be furnished under the contract, the cost per million BTU, and this cost per million BTU under the term contract is compared with

the last column which is the average spot cost at the
1724 plant at that particular month that the contract, the
term contract, was awarded.

We offer this as the next exhibit.

Mr. Kramer: Now, Your Honor, because of the statement
that is at the bottom of this exhibit, which we would like
Your Honor to look at before it is given consideration. We
think it is further objectionable, and inadmissible. After
Your Honor has read it, I will state the basis for it.

(The proposed exhibit was handed to the Court.)

The Court: All right.

Mr. Kramer: That talks about a steam plant projected
out yonder in the future, and Your Honor has already ruled
that evidence in reference to this is objectionable, and this
last three lines remaining on the exhibit in addition to all
other objections disqualifies the entire exhibit. Your Honor
ruled on that.

Mr. Rowntree: If Your Honor please, Your Honor per-
mitted the evidence. We put the contract from the Peabody
Coal Company for sixty-five million tons into evidence. Your
Honor admitted it, and I don't understand counsel's state-
ment. This was a contract made in 1959, Your Honor.

1725 Mr. Kramer: On which delivery was not to begin
and the plant was not to be completed until sometime
in 1962, and as I recall Your Honor's ruling on it, it was
that that was an imagination extending into the future, and
was not admissible.

Your Honor admitted the other of that evidence, but to
that extent, this is a contract that is not yet effective; the
plant is not completed; there is no delivery on it; they
haven't started delivering the first ton of coal on it.

1726 Mr. Rowntree: It wasn't imagination. It was a firm
contract. The contractor agreed to sell the coal; the
TVA agreed to build the plant at the site of the coal com-
pany.

The Court: What was the last point involved in the dates

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after December 31, 1958? We had a point up here this morning that is different from this point.

Mr. Kramer: Yes, there is.

Mr. Rowntree: The point is dangerous possibility of obtaining a monopoly of the TVA market. Now here we have a coal contract for 65-million tons, which is a three and a half year supply of the whole TVA system, and this thing has culminated, your Honor, in the last two years because the records—

The Court: Well, I have held that is competent where the contract was signed, but I also held this morning that you could not bring in testimony about plants that were to be erected as late as 1962.

I don't remember the point that was involved.

Mr. Rowntree: The question was speculative or estimates or assumptions.

The Court: What was the purpose of this testimony? I sustained the objection to it but what phase of the—

Mr. Rowntree: That was in connection with the 1927 growth of the power plants of the TVA and the estimated completion of the last units in the plants.

Mr. Kramer: Also your Honor had before you the question of the type of machinery going to be used out in the future which had not been built but they were talking about building. Counsel says three years' supply of TVA, but remember that contract which Your Honor looked at the other day did not call for delivery over a three-year period.

The Court: That is my understanding, that this exhibit made by the witness refers to the contract that was in existence whereby one of these companies agreed to furnish within a certain period of time.

Mr. Rowntree: That is right.

The Court: The Court holds that is competent and overrules the objection.

Go ahead.

(Exhibit No. 104 was filed.)

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Mr. Robertson: I would like to just summarize, point out a few things on this particular chart. The terms which these companies, which we have charged as being conspirators, were getting under these contracts were of a matter of months during the years 1956, '57 and '58 with the exception of one contract which went into the record, I believe 1728 this afternoon, to Clinchfield Coal Company division of Pittston Company which was awarded on July 8th, 1957 for a period of six years. Total tons 7,500 tons per week until 1959.

And here several companies, which we charged as being conspirators, have been awarded contracts for a number of years calling for large tonnages.

I point out a contract that was awarded to Peabody Coal Company for consignment to Shawnee steam plant for a term of five years at the rate of 20,000 tons per week. Calculations of that shows a total of 5,200,000 tons. That was at a price of, or a cost per million BTU to TVA of .1884.

On September 17th, 1959, term contract awarded to West Kentucky Coal Company to the Shawnee plant for 15 years at the rate of 16,347 tons a week for 15 years. The calculations shows a total tonnage there of 12,750,660 tons.

1729 A contract on September 17, 1959 to Inter-Mountain Coals, which it has been pointed out by Mr. Hill was selling coal on these contracts of Pocahontas Fuel Company, division of Consolidation Coal Company.

This contract, the coal was consigned to Kingston. It was for 5,000 tons per week for five years, or a total of 1,300,000 tons.

On September 17, 1959, the term contract to Kentucky Oak Coal Company for coal consigned to Kingston, at the rate of 8,500 tons per week for a period of 10 years.

On October 30, 1959, a contract to Kentucky Oak, coal consigned to Kingston, at the rate of 4,000 tons per week for 36 months.

At this time, your Honor, for a matter of clarification, we

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have not charged Kentucky Oak as such as being a part of this conspiracy, but as your Honor will recall, that is the company engaged—holding the lands from North Fork Coal Company to whom the union pledged \$1,500,000.

Mr. Kramer: North Fork isn't claimed to be a conspirator. Neither one are claimed to be conspirators, and, of course, we are continuing our objection to this line of testimony.
1730

Mr. Robertson: Yes. Well, North Fork isn't on here.

Mr. Kramer: But you were referring to it just now.

Mr. Robertson: Your Honor, TVA has furnished us with a recent list of awards for term contracts and this shows an award on April 3, 1961 to—

Mr. Kramer: Just a minute. Now we are going down now to even 1961 in this proposition, two years and a half nearly after termination date under your Honor's rule of when damages could be alleged, long after the institution of this suit, subsequent to the taking of practically all the proof in this case.

We, your Honor, do not think it is competent for any purpose. It is irrelevant. We think, your Honor, it may be prejudicial, and we object to the introduction of this testimony. This goes way beyond anything that your Honor has had before you before. These things are just now put in for the first time.

We received copies of these—counsel furnished us copies last Wednesday—maybe it was, or Tuesday, I don't remember, but one day last week—but we insist, your Honor, that it is not competent for any purpose and should not be introduced.

1731 Mr. Rowntree: If your Honor please, upon the question of dangerous possibility of obtaining a monopoly in a market, we think the best and most competent evidence is to look at the situation as it is immediately prior to the trial. And this situation is that TVA puts out term

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awards for 16½ million tons of coal and makes of that 16½ million—

Mr. Kramer: We object to these figures, until they are introduced. That is what our objection is, to the figures. I do not object to counsel's argument, but it is to the admissibility. I object to quoting the substance of it.

Mr. Rowntree: The amount of the tonnage awarded out of that to the West Kentucky Coal Company would be the clearest evidence of the dangerous possibility of these companies obtaining this monopoly.

1732 Mr. Kramer: Let's take the other side, Your Honor.

Suppose that there were a condition that changed the other way, entirely the other way. I don't want to repeat what it might be, it will occur readily to Your Honor—the jury is here—would that be competent from our standpoint to show that there is not a conspiracy? If it wouldn't then what has happened since is not admissible now to show that there was a conspiracy.

We object to it. We think that that rule could not work both ways, and therefore could not work either way, and we object to it.

Mr. Rayson: We want to point out that the TVA witness, Mr. Hill, who testified this morning by deposition, testified the TVA term market was, had been, and going to be seventy-five per cent, and we are talking about the term market again, which Your Honor has already declined admission on the grounds of damages, so it seems to me that this is completely irrelevant, not only from the standpoint of time, but also from the standpoint of its connection with the term market, rather than the spot market. You get so many imponderables in here, the evidence loses whatever weight or validity it might otherwise have.

1733 Mr. Robertson: I might add this, Your Honor, I am not standing on this completely, but it certainly shows the ability of the companies to take part in a con-

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spiracy to monopolize, that is, it shows a monopolization ability.

The Court: Well, the question running through the Court's mind is when is this period involving the imminent possibility or dangerous possibility of a monopoly to end? Can you go on ten years from now?

Mr. Rowntree, there must be a stopping place somewhere.

Mr. Rowntree: In a continuing conspiracy, Your Honor, the more the parties charged with the conspiracy attain their objective—

The Court: Then you want this to go in the record on the theory that there is a continuing conspiracy?

Mr. Rowntree: Yes, sir.

The Court: Well, the objection is overruled. It may go in on that point.

Mr. Robertson: Your Honor, I point out that since this was only recently furnished us, this particular award, it does not appear on this chart. It is a term contract to West Kentucky Coal Company awarded April 13, 1961. It calls for 19,250 tons for one hundred and twenty months or ten years.

1734 The Court: Now when you get to a stopping place, let me know.

Mr. Robertson: Yes, sir.

The total maximum commitment by the TVA on this group of awards was sixteen million, five hundred and sixty-three thousand, eight hundred eighty tons, sixteen and a half million tons.

West Kentucky alone on this was awarded a total of ten million, ten thousand tons.

1738 DIRECT EXAMINATION (Cont'd.)

By Mr. Robertson:

Q. Mr. Schmidt, referring now to the charts which were introduced yesterday as Exhibits 101, 102 and 103 covering

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the large tonnages of 10,000 tons or over, certain
1739 companies were listed on those three charts.

Were those the only companies that you found that ever bid more than 10,000 tons? A. Those were the only operating companies that bid over 10,000 tons. There was one exception. Old Ben bid in 1958.

Q. Did it bid very much? A. No, just a few times. All the rest were sales agencies handling other coals.

Q. Handled different people's coals? A. That's right.

The Court: What three companies bid over 10,000 tons? I haven't seen these exhibits? Just what three companies are they?

Mr. Robertson: They are Pittsburgh & Midway, Peabody and West Kentucky and Nashville Coal companies. And we also introduced the exhibit on the DeBardeleben and Traux-Traer who also bid over 10,000 tons.

On Exhibit 104, the last exhibit introduced yesterday concerning the term activities of those companies who we charge as being conspirators in this case as compared to the spot activity of the particular plant at the particular time they got the contract, has not been passed to the jury, and

I will ask the Marshal to do so.

1740 (The exhibit was passed to the jury.)

Mr. Robertson: If the Court please, on the term awards that were introduced as exhibits to Mr. Hill's deposition on yesterday, they went through October, 1960. There have been two award sheets put out by TVA since that time which TVA has furnished us, and one of which contains the contract referred to yesterday to West Kentucky Coal Company.

We have these two award sheets and offer them as exhibits to complete the term list.

Mr. Kramer: Of course, we continue our objection both as to date and the ones heretofore given, immateriality and irrelevancy. But we also call attention of your Honor to the fact that counsel admitted yesterday that they were not

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claiming that they ever participated or attempted to participate in any term awards.

They are limiting their claims to spot awards, spot bids, and we think for the further reason that these are irrelevant and immaterial for that reason.

The Court: These exhibits will have no bearing on the question of alleged damage involved in this case and the jury will not consider such exhibits as bearing on 1741 damages because they are outside of the period that is involved in this suit.

The Court receives these exhibits as evidence for whatever bearing, if any, they may have on the alleged continuation of the alleged conspiracy.

1742 Mr. Robertson: The first one of these is entitled "List of Awards, Coal Invitation to Bid, Requisition Number 35. Bids Opened September 1, 1960."

(Exhibit No. 105 was marked for identification and filed.)

Mr. Robertson: The second is entitled "List of Awards, Coal Invitation to Bid, Requisition Number 37. Bids Opened February 14, 1961."

(Exhibit No. 106 was marked for identification and filed.)

Mr. Robertson: We just point out that the first two pages of this award sheet are already in this list, but it contains a supplemental list of awards on the third page of that. Those awards include an award to Clinchfield Coal Company, division of The Pittston Company, awarded October 14, 1960, 5,000 tons per week for 12 months.

And Exhibit 106, the total maximum purchased on this list, 16,563,880 tons, of which West Kentucky Coal Company was awarded 10,010,000.

1743 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Schmidt, I believe that you worked for Royal Fuel Company during 1951 up until the time of your retirement, is that correct? A. That is right.

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1744 Q. What is Royal Fuel Company? A. It is a sales agency.

Q. Is this a partnership? A. No, it is owned by Hubert Baldwin.

Q. Was there not a man named Pennington in this business for a while? A. Yes, he was at first, yes.

Q. How long was he with the business? A. I would say—probably six or seven years, I imagine.

Q. He was with it up until at least '58 or '59, wasn't he? A. He was with it through '56, '57, '58, '59, yes.

Q. Isn't he some relation to the cross plaintiff James Pennington? A. He is a brother.

1745 Q. Now do you sell coal for a number of small companies? A. Yes, sir, We do.

Q. And I take it that you have sold a good amount of coal to the TVA? A. That is right.

Q. Who are your other customers? A. Well, it depends on the coal. TVA uses nut and —

Q. Uses what? A. Uses the crushed coal. We sell crushed coal to Duke, Tampa, various places like that.

Q. Is this an inferior coal? A. No, it is used for steam coal, called steam coal. It is a crushed coal.

Q. You can't use it for domestic purposes? A. For domestic purposes, they want block, egg and stoker, which is taken from this coal, which is made into block, egg and stoker.

Q. The steam coal is quite often a by-product of producing the domestic coal? A. In some cases it is, yes.

Q. Now in selling your coal, I suppose that you would always try to place the coal with the highest bid that you could get, is that right? A. Yes, naturally.

Q. And you would sell it to TVA, if TVA were paying a high price for it at that particular time, and you would sell it to somebody else, if you could? A. That is right.

Testimony of I. E. Schmidt

Q. If it was paying a higher price than the TVA, is that right? A. That is right.

Q. Is that why that you sold certain of Phillips Brothers coal to Duke Power Company during a portion of this period? A. That is right.

Q. Duke Power was paying more for it than the TVA? A. We sold both to Duke and Tampa.

Q. For the same reason you sold certain coal to Tampa, is that right? A. Yes, sir.

Q. TVA wasn't paying as much as Tampa then? A. That is right.

Q. But then at the times that the TVA, you were selling to TVA, you either didn't have bids from Duke or Tampa or they were paying less than the TVA, is that correct? A.

Some freight rates were involved in this shipping 1747 to Tampa and to Duke. We had to come off of the

Southern and L. & N. Some of the TC coals were not what Tampa and what Duke would want. TVA goes up to 16 per cent ash and the power companies probably 14.

Q. In other words, TVA will take a coal with more impurities in it? A. Up to 16 per cent ash, yes.

Q. Now in some of the exhibits that you have filed, Exhibits 98 through 104, you have a figure after the TVA bids showing a cost per BTU's. You know what I refer to? A. Yes.

Q. Now would you explain that figure? For example, on your Exhibit 98, you show that in March of 1957 Phillips Brothers made a bid to the Kingston steam plant on coal for 1962. Would you explain just what that figure means?

A. It is hard to explain. It is the TVA's figures for the cost of the coal to their plant per million BTU, which is based on the analysis of the coal.

Q. Is that the only point that that figure takes into consideration, the analysis of the coal? A. The analysis, the freight rate, yes, that is covered, the freight rate and analysis of the coal.

Testimony of I. E. Schmidt

Q. The freight rate and analysis of the coal? A.
1748 Yes.

Q. Does the coal have an inherent amount of BTU's in it as it sits in a given location? A. No, coal varies. It is hard to tell exactly a perfect analysis of the coal.

Q. What makes it vary? A. The location.

Q. Well, what makes a given — A. The seam of coal changes. The seam of the coal changes. Different seams of coal have different analyses.

Q. Are there more or less impurities in the coal, ash?
A. You mean as a seam? Well, there is one seam that has a very good analysis and another seam that has a very poor analysis. Is that what you mean?

Q. That is right. Why does it have a good analysis at one place and poor in another? A. I imagine in the original composition of the coal in producing that — I don't know. I am not a chemist, understand.

Q. The greater the impurities, however, the less the BTU's, is that right? A. The poorer the coal.

1749 Q. And of course the greater the distance from the mine — A. That's right.

Q. — the more it costs to transport the coal to the mine?
A. That's right.

Q. And so taking those two factors into consideration, the TVA, as I understand you, comes up with a price per million BTU's delivered to a given steam plant? A. That's right.

Q. Now, do you submit your bids on the basis of these — of the cost to TVA per million BTU? A. Whenever we have — we have the prior bids, the successful bids they had the week before, and from those — we are governed on bidding coal from those records ahead of us.

Q. What I asked you, do you submit a figure to the TVA per million BTU, or do you submit simply a tonnage figure?
A. They figure the BTU's.

Testimony of I. E. Schmidt

Q. Now, do you submit — A. Before I submit it.

Q. Do you submit a tonnage figure? A. Before I submit the bid, I figure the BTU.

Q. Did you submit a tonnage or BTU — A. I submit a price figure to TVA, a tonnage price.

Q. A tonnage price? A. Yes.

Q. All right. A. I don't now. You see, I have been out of this since 1959.

Q. I understand, Mr. Schmidt. A. By the way, before we submit that tonnage or the price figure, we figure this out ourselves to see that we are in line with what TVA has been paying.

Q. You try to keep your prices in line with what happened the week before insofar as the spot market is concerned? A. If you want coal, you have to.

Q. If you want to sell, you have to keep your price in line with what happened before? A. Yeah.

Q. Is that generally true? A. Yeah.

Q. As a matter of fact, in 1957, isn't it true, Mr. Schmidt, that you sold Pennington coal to the TVA in most instances below the average market price? A. Uh huh.

Q. That's correct, isn't it? A. What the chart shows. I can't remember off hand.

Q. Do you have any independent recollection of that? A. Well, the price — one or two cents makes quite a difference in the cost per ton of coal.

Q. One or two cents per million BTU's? A. Yes, uh huh.

Q. My question is, did you sell your Pennington Coal, Phillips Brothers coal to TVA in 1957 below the average TVA market? A. The average TVA market is based on the lowest cost, and the highest cost. We were within that range of cost. You have only the average shown there, you see. On my weekly reports, I have both the high and the low. I should be within that line.

* * * * *

Q. I have handed the witness Exhibit 98, and I will ask him to look at the figures for '57. A. Yeah.

Testimony of I. E. Schmidt

Q. Shown on that exhibit. A. Yes.

1752 Q. As I understand it, you submitted a bid for Phillips Brothers in January of nineteen and four-tenths cents per million BTU's. A. It wasn't — we didn't get the bid.

Q. But what was the average bid to the Kingston Plant in that time? A. .1955.

Q. In other words, it was one and five mills per million BTU higher than your bid for that month? A. That's correct, yes, sir.

Q. Now, in April, what was your bid to TVA? A. In April for TVA, our bid to Kingston was .1849, and .1930 for John Sevier.

Q. And that also was below the average bid to the TVA for that month? A. That's right.

Q. And this holds true, I believe, in the months of May, June, August, September, and October, is that not true? A. Uh huh, that's true.

Q. In other words, Phillips Brothers was below the market? A. May I say something on that first, please? We received from TVA each week their analysis or their
1753 breakdown of their successful bids. Well, it gives a low bid and a high bid that we try to stay — to be sure to get the coal, we try to stay close to that low bid.

Q. You try to stay within what happened in the preceding week? A. That's why the variance there on that, because we were staying on the low figure.

Q. Mr. Schmidt, you brought with you a number of pages — A. Yeah.

Q. — from the records of your company. A. Yes, sir.

Q. Yesterday, showing that the sales of Phillips Brothers Coal Company to the TVA and other installations for March of 1956 through the year 1958. Do you have any of your company's records — A. No, sir.

Q. For the years prior to that? A. That's all I have. That is all I have with me.

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Testimony of I. E. Schmidt

Q. I show you what purports to be a photostat of your company's records. A. That's my writing, yes.

1754 Q. Beginning in 1955, October of 1955? A. Uh huh.

Q. Now, would you start there and starting with October 18, and tell us at what price you were selling Phillips Brothers coal both the gross price and price after deduction of Royal's commission. A. It starts down here in November. This is all Duke Power up here.

Q. Well, start with the Duke Power figures in October, October 18, 1955, and proceed through March, 1956, where you started yesterday afternoon. A. I didn't get that.

Q. What was the price at which you were selling coal to Duke Power Company? A. Okay.

Q. In October, 1958, both the gross price and the net price? A. All right, Duke Power Company in 1955 was gross \$3.35, and the price was \$3.055, net. And that continued on to the end of the month.

October the 1st, we shipped —

Mr. Kramer: Are we in 1955?

The Witness: '55.

1755 Q. October 1st, are you going to — A. October 1, 1955, the TVA price on S-84 was \$3.53 against \$3.28.

Q. How long did that price continue? A. We have two shipments on that, but on the — we shipped — this is private here — that is not a steam coal. That price continued — it is hard to read that sheet — that price continued to the end of the month.

Q. To the end of what month? A. To the end of October. I believe it was. End of November.

Q. And what does the — what do your records show after that? A. Then in the month of December, we had the price \$3.53 against \$3.28.

Q. Is that also to TVA? A. That is also to TVA, yeah, S-84, that is the order number.

Testimony of I. E. Schmidt

1756 Q. Does this exhibit show whether Phillips Brothers produced any coal during that time, December to March? A. During the month of January — this is 1956, is it?

Q. That's right. A. January, February, and March, until the 23rd of March, Phillips Brothers were down.

Q. And that's where you started yesterday afternoon in your explanations? A. That's right, and this is '56.

Q. That's right. A. I was reading '55.

Q. You were reading '55? A. That's right.

Q. And it wasn't to '56 that the price of TVA coal suddenly jumped up, is that right? A. That's that?

Q. What was the price at which you started selling coal for Phillips Brothers in 1956? A. \$4.49 in 1956, March, yes.

Q. And prior to that time, it had been substantially below that figure had it not? A. On those figures I read, yes.

1757 Q. Well, as a matter of fact hadn't it been substantially below that \$4.00 figure for a long time before 1956? A. No. We were getting up four, four and a half to four-sixty for TVA coal prior to 1956.

Q. But you were selling coal at the average price to TVA prior to 1956, weren't you? A. At that time, yes, which is a dollar more than shown here.

Q. Mr. Schmidt, are you telling us that you sold coal to the TVA prior to 1956 and that you got around \$4.00? A. Yes. 1953, 1954, '55, all through there, yes.

Q. What would you say would be— A. I would have to go to the records to get it exactly, the exact figure, and it was over \$4.00.

Q. What would you say that would be in terms of an evaluated price to TVA? A. I couldn't say without the analysis of the coal and the freight rate and all that stuff, and I don't remember that long ago. I need the analysis of the coal to figure any kind of a TVA price.

Testimony of I. E. Schmidt

Q. Are you telling us that the TVA prices were
1758 higher before 1956? A. Yes, sir, they were.

Q. Than they were in 1956? A. They were very good in 1952 and '53.

Q. What about just prior to 1956? A. Prior to 1956?

Q. Yes. Say, 1954, 1955. A. You get me in the records here that I—I have handled a lot of coal in these last years, and I can't get you the exact figures on those away back there.

Q. Do you have any general impression? A. If I had the books here I could tell you exactly.

Q. What? A. I said if I had a copy of these I could tell you exactly. You are not talking about Phillips Brothers. You are talking about the over-all picture?

Q. General TVA market on spot coal. A. That's right. We were getting over \$4.00 in those years, 1952 and '53.

Q. Mr. Schmidt, it would be a simple matter for you to find by looking at those records, wouldn't it? A. Yes.

Q. You are quite familiar with those records? A. Yes.

Mr. Rayson: Your Honor, we have taken those records
1759 and have starting in February, 1954, we have taken the weighted averages of each of these plants, and it seems to me it would unduly burden this gentleman to make him go through those records. May I just simply read those figures to the jury?

The Court: Yes, subject to their checking.

Mr. Rayson: In fact, we have some charts here we can hand to the jury that they might follow.

Mr. Marshal, will you hand the witness a copy of the exhibit, please.

Your Honor, we show in this exhibit the average weighted price of spot coal for the periods given.

Mr. Rayson: We show on this exhibit the average weighted prices for the sale—or for purchases of spot coal by the TVA per million BTU at the Kingston and John Sevier steam

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plants. These of course, were the steam plants—the only steam plants to which Phillips Brothers sold coal.

Now you will recall that yesterday afternoon an exhibit was introduced showing the pattern of bids started in 1956 through 1958. This exhibit shows what happened 1760 prior to 1956.

In other words, it starts two years before that and shows the development in the price of TVA coal up to 1956. And I think that the Kingston plant weighted averages alone will show what we are getting it.

Thus in February of 1954 at Kingston the average price was 17 cents and 6 mills per million BTU to everybody that sold coal and delivered it to that plant, and that price continued in the 17's through May. And then it went to the 16's in June of 1954 through the balance of that year.

Then in 1955 it went back up to the 17's until August. Then it went to the 18's for September and October, going up; then it went to the 19's, still going up—and in the early 1956 period through August of that year it got to the 20's, and that was the only time during this entire period that it reached that point at the Kingston plant.

Then it descended again although it never reached the level after 1956 as shown on this exhibit that it was during the two-year period prior to 1956.

Your Honor, I would like to introduce this exhibit.
1761 The Court: All right, you may do so.

Mr. Rayson: As an exhibit to Mr. Schmidt's testimony.

(Exhibit No. 107 was marked for identification and filed.)
By Mr. Rayson:

Q. Mr. Schmidt, as I understood you, you prepared certain of these exhibits showing the bids that certain companies made to the TVA on the spot coal market; is that correct? A. Yes, sir.

Q. You did that on one company. For example, the West Kentucky Coal Company. A. That is right.

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Q. Now I would like you to look at the exhibits you prepared on West Kentucky Coal Company and explain a few things to us. A. Yes.

Q. What exhibit number is that, please? A. 102.

Q. I also hand you Exhibits 82, 83, and 84 —

Mr. Rayson: Exhibits 82, 83 and 84, your Honor, are the bids submitted to the TVA on spot coal and the awards made by the TVA.

The Witness: This is a term bid. You got the wrong one here, I believe.

1762 Mr. Rayson: All right.

By Mr. Rayson:

Q. I believe the other two cover the period we are interested in. I would ask you to refer to the bids shown on your exhibit from the Uniontown mine. A. Yes.

Q. When do those bids start? A. They start in March, 1957.

Q. And what was the evaluated price? A. Of March, 1957.

Q. On that bid. A. They bid on Colbert .2180 on the evaluated price. 12,500 tons.

Q. How many bids did they have at that price? A. They made three bids at that price through the month of March.

Q. Do you have any idea, Mr. Schmidt, what the highest bid that the TVA made an award on for that period? A. I don't know.

Q. Would you mind looking through those exhibits and tell us? A. You mean through here?

Q. Yes, sir. A. It would take a long time to go through those things. You mean the highest award made during that period?

1763 Q. I am talking about, for example, one of the bids made by West Kentucky that you have just referred to on March 13, 1957.

Now it made an evaluated bid of 21.8 cents per million BTU — A. Which they did not get.

Q. Which they did not get. A. That's right.

Testimony of I. E. Schmidt

Q. I want you to examine those records and tell us whether anybody bid lower than that at that time? A. During the month of April —

Q. That would be March or April. I don't know which it would be in.

Mr. Rayson: Your Honor, I realize this will take a little time but I think it is a matter of importance.

1770 Q. Actually, Mr. Schmidt, if it is the same coal, wouldn't the entire difference be in the cost of transportation? A. I don't believe there is that much difference in the cost of transportation between those plants.

Q. Do you know where the Uniontown mine is located? A. No, I don't. They are in the same general vicinity, I think, as far as I know. I don't know. I wouldn't say about the cost of transportation. I wouldn't know.

Q. You know where the Shawnee plant is located? A. I know where the Shawnee plant is located, yes.

Q. It is on the Ohio River, isn't it? A. Yes, but I don't know where these mines are, I don't know.

1772 The Court: Mr. Rayson, I don't want to tell you how to try the lawsuit or examine the witness. May I suggest to you that you can do this much faster if you will just prepare those figures and introduce them. These records speak for themselves.

Mr. Rayson: All right, I have them here.

The Court: Instead of having this man thumb through these papers. I know this can be done much quicker. If you have the figures, show them to your adversary counsel and they will have a right to examine them and you can read them in the record, Mr. Rayson. This is too tiresome to sit here and wait. It is an imposition on the jury.

Mr. Rayson: All right, I will simply read these.

1773 Mr. Rayson: Your Honor, these then, what I shall read, I shall start with the first bid shown on Mr.

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Schmidt's exhibit with the Uniontown mine, which I have under date of February 28, 1957, and will proceed through all of the Uniontown bids, these being the major bids submitted by West Kentucky that they have been talking about.

* * * * *

1774 The Court: What records do you say, TVA? I guess TVA has more records—at least they claim they have — than any other concern in this whole area.

Mr. Rayson: We are willing to admit that they do, your Honor.

I am talking about Exhibits 82 through 92.

The Court: Gentlemen, if you don't understand any of these figures, you may ask Mr. Rayson where he obtained them so you will have a chance to examine them yourself, and you will have a chance to point out if there are any inaccuracies in these figures.

Go ahead.

Mr. Rayson: All right, starting again, February 28, 1957, West Kentucky Coal Company submitted a bid on

1775 12,500 tons at an evaluated price at the Colbert steam plant of 21.8 cents per million BTU's. No award was made on this bid.

1776 Mr. Rowntree: I think we should establish that the Colbert Plant is in Alabama.

The Court: All right.

Mr. Rayson: That's right, and I might say this, Your Honor, in connection with what I was asking Mr. Schmidt. I don't believe there would be any dispute about the fact that the Uniontown Mine is on the Ohio River. Coal is taken by barge from that mine. The Shawnee mine — the Shawnee Steam Plant of the TVA is about a hundred miles down the river from the Uniontown Mine. The Colbert Plant requires the Uniontown coal to be barged down the river, across Tennessee, into Alabama.

I might explain, too, that sometimes the TVA will evaluate bids at more than one market, and the difference in the price results in the difference in the freight rate. For ex-

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ample, at one point here, there is a bid at Colbert of .1804, and at the same time, there was one to Shawnee of .1675. It is the same coal, the difference is the cost of transporting a greater distance to Colbert than it is to Shawnee.

Now after being unsuccessful in the February, 1957, bid at .2180, a bid at the same price was submitted by West Kentucky in March for the same amount of coal. This 1777 bid was also unsuccessful.

Again in March, on the same amount of coal, West Kentucky submitted a bid at .2180, and the bid was again unsuccessful.

Now, during — on each of these bids, there were people who bid lower than West Kentucky to whom awards were made.

Now, in March, in the latter part of March, 1957, after those three unsuccessful bids at .2180, West Kentucky submitted a bid on twenty thousand tons at .1961. Nineteen cents, six and one-tenth mills per million BTU's. This bid was also unsuccessful.

The same bid, the same amount of coal, the same price, was made in April of 1957. This bid was also unsuccessful.

The same bid was repeated later in April of 1957 at the same price. It was also unsuccessful.

At that time, West Kentucky's bid was .1961, and the highest bid was in the neighborhood of .1829. In other words, over a cent, about a cent and a quarter below West Kentucky.

Now then, West Kentucky, in September of 1957, submitted a bid which was evaluated at Colbert at .1804, and at Shawnee at .1675 on sixty thousand tons. This bid was unsuccessful.

1778 Mr. Rowntree: Could we point out, Your Honor, at that point, that this was a bid for sixty thousand tons at almost four cents below the first price quoted by Uniontown Mine in this series?

Mr. Rayson: This is true, Your Honor. However, it is

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delivered to a different steam plant, where the transportation factor was much less.

Mr. Rowntree: I am talking about BTU cost at Colbert on that bid.

Mr. Rayson: That's correct, and it was still substantially above the market at that time. The market —

Mr. Rowntree: Our point is, it was a drop of almost four cents below the first bid in this series.

Mr. Rayson: I don't happen to have off hand the highest successful bid figure at Colbert at that time. However, the same bid was evaluated at .1675 at Shawnee, that is the West Kentucky bid. The highest successful bid to Shawnee at that time was .1617, more than one half a cent below West Kentucky's bid.

Again in September of 1957, West Kentucky submitted a bid on sixty thousand tons which was evaluated at Shawnee only. This bid was at a price of .1668. At that time the highest successful bid at Shawnee was .1613, approximately one-half a cent below West Kentucky.

1779 On September 27, 1957, West Kentucky submitted a bid at the same price, .1668. At that time, it was unsuccessful on eighteen thousand tons of coal, and this is the point at which we had arrived with Mr. Schmidt when I asked Mr. Schmidt was this the highest successful bid awarded by TVA at that occasion, and the records show that at that time, West Kentucky's bid was the highest bid on which the TVA made an award.

After that successful bid, in October of 1957, West Kentucky repeated the bid on from eighteen to sixty thousand tons of coal. Again at the same price, .1668. It was unsuccessful. There were people who bid less than West Kentucky and got the awards.

Again in October, that bid was repeated, and it again was unsuccessful. At that time West Kentucky's bid was .1668 as it had been, and the highest successful bid was

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.1635, approximately one third cent per million BTU's below West Kentucky.

This is 1957.

Now again in October, 1957, West Kentucky made a bid of .1668, and it again was unsuccessful.

It made a bid following those three unsuccessful bids at .1649, and it received an award for eighteen thousand 1780 tons. This was on October 25, 1957. At that time, the bid submitted by West Kentucky was the highest bid upon which TVA made an award. In other words, there were several other bids lower than West Kentucky's on that occasion.

Mr. Rowntree: Do you recall, counsel, off hand the size of those successful awards?

Mr. Rayson: I do not.

Following that successful bid, West Kentucky submitted a bid for .1651. It was unsuccessful.

It then submitted a bid in November of 1957 at .1649, and that, too, was unsuccessful. At that time, the high successful bid was .1630, approximately a quarter of a cent below West Kentucky's bid.

After losing on the .1649 bid, West Kentucky submitted another bid at .1649 in November of 1957, on which an award was made by the TVA on eighteen thousand tons. At that time, the West Kentucky bid was the highest bid on which TVA made an award. Again there were several bids lower than the West Kentucky bid.

West Kentucky repeated its .1649 bid again in November, on thirty-six thousand tons, and again it was awarded a contract.

Following that successful bid in November of 1957, 1781 it repeated its .1649 bid and was not awarded a contract.

It submitted another bid at the same price, .1649, in December of 1957; without success, was not given a bid — was not given an award rather.

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Then again in December of 1957, after having submitted bids at the .1649 level unsuccessfully, it submitted a bid at .1616, on which it was given an award for thirty-six thousand tons. We would point out that on this occasion there were no unsuccessful bidders to the Shawnee Plant.

After receiving an award on a bid of .1616 —

Mr. Rowntree: We would like to point out at this point that that was a drop of thirty-three hundredths mills in that price from .1649 to .1616.

Mr. Rayson: That is correct, after they had bid unsuccessfully at the previous level twice.

Then in December, after having received an award at .1616, they bid again at .1616, and they were not granted any award at that price.

After losing out at that price, and in January of 1958, West Kentucky submitted a bid at .1599 per million BTU's, on which it was awarded the contract for fifty thousand tons.

It repeated—

1782 Mr. Rowntree, I would like to point out at that point, Your Honor, that that was a drop of .17 for fifty thousand tons.

Mr. Rayson: That was after it had been unsuccessful at .1616, Your Honor.

After having been given an award at .1599, it submitted another bid at .1599 on which no award was made, and there were others lower at that time. The highest successful bid was .1576.

They repeated a bid in January of 1958 at .1599 on which no award was made, and at that time the high successful bid to the Shawnee Plant was .1555, approximately one-half a cent below West Kentucky's bid.

After bidding unsuccessfully at .1599, West Kentucky submitted a bid on January 29, 1958, of from eighteen to fifty thousand tons at .1586, a drop of thirteen mills—one and three-tenths mills. They were still unsuccessful. They did

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not get an award on that bid, and at that time the high award was .1555, approximately a third of a cent below West Kentucky's bid.

West Kentucky then submitted two bids to Shawnee at .1777, both of which were unsuccessful.

And then, in March of 1958, they submitted another bid at .1586 on eighteen thousand to fifty thousand tons 1783 of coal which was unsuccessful.

And that concludes the bidding that was made on the Uniontown Mine to TVA as shown on that exhibit.

Mr. Robertson: If Your Honor please, I would like to point out at this time that those figures for the Uniontown bids which Mr. Rayson read are set out in our chart which was filed yesterday. I believe it is 102, isn't that correct, Exhibit 102?

Mr. Rayson: I believe that's correct, Your Honor, and of course, Your Honor, we point this out to show that by and large West Kentucky's bidding was unsuccessful, and that when it was successful, it generally was at the top level of awards made rather than at the bottom level.

Mr. Rowntree: Your Honor —

Mr. Rayson: Now, Mr. Schmidt, one or two questions.

Mr. Rowntree: Your Honor, our point on that is that they were bidding on exceedingly large tons on the little spot market, and dropping their price all the way.

Mr. Rayson: I assume that anybody who wants to sell has to have their price competitive with what the market will stand, and I think, as what I have just said, shows, Your Honor, West Kentucky was at the high range 1784 and was on a falling market, and was not on the low range of a falling market. I don't see how it could be construed any other way.

1785 The Court: Now members of the jury, you have seen and heard what has taken place during the cross examination of this witness. In order to save time, and in order to save this witness from anxiety and a lot of work,

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the Court requested Mr. Rayson to read into the record for the benefit of the jury the figures which have been taken from the records of the TVA and which have been filed in this record.

The jury will find that these figures that Mr. Rayson has read to you are correct unless before this trial terminates Mr. Rowntree and Mr. Robertson point out to you some inaccuracies in the figures. They will be given that opportunity before the trial ends..

* * * * *

By Mr. Rayson:

Q. Mr. Schmidt, you have been handed Exhibit 100 which shows tonnage purchased at the TVA eastern plants and western plants for the years 1956, 1957 and 1958:

1786 Now first would you explain whether these figures are for spot coal only? A. Spot coal only; yes.

Q. Does this exhibit take into account whether or not TVA was developing its stockpile or depleting its stockpile during the years. A. That I don't know. I took the figure only out of the book. Let me say in passing here, that 1956 the eastern plants included Watts Bar.

Q. Did it not in 1957 and 1958? A. No. They quit using Watts Bar in 1957 and 1958.

Q. That would account for some of the decrease in the eastern plant purchases, is that right? A. In the following year, yes. In the year 1957 it would, but not in the year 1958.

Q. But it would account for the drop in the year 1957 as far as the purchases at the eastern plants? A. Yes.

Q. In order to calculate the amount of coal used by the TVA in its eastern division and the western division, you would actually have to take into account both the term deliveries to the eastern plants as well as the spot deliveries to the eastern plants, would you not?

1787 Is your answer to that yes, Mr. Schmidt? A. Yes, you would.

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Q. These figures would have no significance in themselves?

A. This is spot bid only.

Q. That's right, and so if the TVA had term contracts expiring at certain places, or if they had term contracts delivering coals to other plants, that would have an effect on the amount of spot coal that it would buy, would it not, at a given plant? A. I don't know. I don't know. I never tabulated the term bids.

Mr. Rayson: During Mr. Schmidt's cross examination I referred to two pages from his company's records and neglected to put them into evidence.

Mr. Rowntree and I have agreed that they may be 1788 put in evidence as exhibits to his testimony at this time.

The Court: Yes, sir.

Mr. Rowntree: That is correct.

(Exhibit No. 108 was marked for identification and filed.)

JOHN H. AMOS

called as a witness by and on behalf of the defendants and cross-plaintiffs, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. This is Mr. John H. Amos? A. Yes, sir.

Mr. Rowntree: For the record, your Honor, Mr. Amos was designated in our pre-trial list of witnesses. Saturday we received from opposing counsel a request that we have Mr. Amos have with him a number of items of documents pertaining to Tampa Electric Company, other companies' correspondence with reference to Tampa Electric Company, records of Love & Amos Coal Company with respect to Nashville Coal, Inc., West Kentucky Coal Company, Peabody Coal Company, and all papers relating to rail shipping rates to Tampa, Florida.

1789 I would like the record to show that Mr. Amos has brought all those papers over with him and that they

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have been made available to counsel.

Mr. Kramer: We admit they were made available to us yesterday and we had an opportunity to do some work. We did not request them at the last minute. We may not have gotten it all done, but counsel complied with request of counsel.

We have had no trouble with either side during this entire lawsuit, your Honor.

The Court: You gentlemen never have any trouble with each other. That makes it so good for the Court.

By Mr. Rowntree:

Q. Where is your residence, Mr. Amos? A. Franklin, Tennessee.

Q. When did you first get into the coal business? A. In the early part of 1918.

Q. What was your position at that time? A. I went to work in the office of one of Jewitt, Bigelow & Brooks' mines on First Creek in Perry County, Kentucky.

Q. Is that in the Hazard field? A. Yes.

1790 Q. Did you work in the office there? A. Yes, sir.

I worked as a bill clerk to start. And at that time the World War I was going on and there was a big manpower shortage and so they permitted anybody that wanted to to work in the mines at night. And I loaded coal in the mines for a while at night.

Q. Did you become a foreman of a section? A. Later on I did; yes, sir.

Q. Did or were you moved to Cincinnati some period later on in the office of Jewitt, Bigelow & Brooks about 1920? A. Yes, sir. I think that is right. About 1920 they had been using me as a trouble shooter at some of their other mines. Send me in at times when they had some trouble. So they moved me to Cincinnati so I would be centrally located. Their mines were scattered all the way from Tennessee to the Clarksburg field. They were putting in a new mine in the Clarksburg field at that time. That is West Virginia.

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Q. How many mines did they have? A. I think at the top they had 21.

Q. What was your job in Cincinnati? A. Well, I gradually, from doing the trouble work of the president of the company, who was too busy to get around all the time, I gradually was in charge of all mines.

1791 Q. Will you talk a little louder, Mr. Amos, so the jury can hear you. A. Yes.

Q. About 1923 did you go to Crawford, Tennessee? A. Yes, sir, I did.

Q. And what was your job there? A. I was in charge of the Briar Hill Collieries on the Tennessee Central Railroad.

Q. What size mine was that? A. It was a thousand to 1200-ton-a-day mine.

Q. And in 1928, I believe, you started a sales agency, Love & Amos Coal Company? A. That is correct; yes, sir.

Q. Have you had interest in coal producing properties since you started Love & Amos Sales Agency? A. Yes, sir, I have.

Q. And did you have an interest in the Crescent mine in West Kentucky? A. Yes, sir. I own a half interest in the Crescent mine.

Q. What size mine was that? A. We produced around a million tons of coal a year.

Q. And was it a mechanical mine? A. It was the first 1792 completely mechanized mine in West Kentucky.

Q. Does that have a union contract? A. Yes, sir.

Q. Did you have an interest in the A B & C mine at Monterey, Tennessee, subsequently? A. Yes, sir. I own one-third of that mine.

Q. Did you have an interest in the Fentress mine at or near Monterey subsequently? A. Later on, I believe it was 1956.

Q. What size mines were those? A. Well, neither one of those mines ever actually got into full production or any-

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thing like full production. Both of them were being put in to serve the Kingston steam plant of the TVA. They had had freight rate to Kingston and both of them were intended to be mined on about 2500 ton daily production, each. But they never got — The Fentress mine was a completely mechanized mine.

Q. Did you have a TVA contract at Fentress? A. Yes, sir, and at ABC.

Q. When did that contract terminate? A. It was terminated December 31, 1957.

Q. And what happened to the mine at that time? A. The mine's being liquidated and is now — the equipment is being sold off.

1793 Q. Did you have a union contract at that mine? A. Yes, sir, at both of those mines.

Q. Have you had connection in this period of time after Love & Amos was started, the sales agency, have you had connection with small mines in Tennessee? A. Yes, sir.

Q. Whereabouts? A. Virtually all over the state.

Q. Did you have some loading ramps on the Crawford Branch of the Tennessee Central in Fentress and Overton Counties? A. Yes, sir.

Q. And what sort of business did those loading ramps do?

A. They assembled coal from small mines.

Q. Where did the people come from that worked in those mines? A. They were local people who had formerly worked in the large mines there on the Tennessee Central, on the Crawford Branch of the Tennessee Central.

Q. What had happened to those large mines? A. All of them had gone out of business. There were three large mines there on that branch.

1794 Q. Did you have an interest in an operating company in northeast Tennessee? A. Yes, sir.

Q. In or about Campbell County and that vicinity? A. Yes, sir. The coal was actually over the state line in Kentucky, but it was being loaded at Jellico.

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Q. Did you have any interest in a company in southeast Tennessee? A. At one time I did, in the Saradeana Coal Company, yes, sir.

Q. Did it buy coal from small mines? A. It stripped and bought coal from small mines.

Mr. Rowntree: If your Honor please, we would like to turn to the Tampa Electric Company situation and would offer in proof as the next exhibit a certified copy of the record of Tampa Electric Company v. Nashville Coal Company, Nashville Coal, Inc. and West Kentucky Coal Company.

Mr. Kramer: We seem to have misplaced it at the moment.

Mr. Combs: In connection with this exhibit offered, your Honor, the exhibit does not take into consideration the Sixth Circuit Court's or the Supreme Court's opinion on this.

1795 . The Court: You are entitled to have those in the record.

1796 (Exhibit No. 109 was marked for identification and filed.)

Mr. Rowntree: The principal purpose of this, your Honor, is to state the position of Nashville Coal Company with respect to the complaint that was filed against it in this case, as a judicial admission by that company of its attitude and position upon this contract. And rather than reading a lot of pages, I would like to just state it, if it is agreeable with counsel.

Mr. Kramer: Your Honor, we don't object to the introduction of this entire record of this case. Now this is a matter of some prior litigation and statements made therein. We do not think it would be binding for any purpose in this present case. We think this is irrelevant and immaterial.

Now, of course, I recognize the rule, your Honor, with reference to statements made in pleadings where it becomes

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material, but I don't see where this is material to this present lawsuit.

1799 (Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Kramer: I think, your Honor, counsel ought to state fully what he expects to prove in this record and the reasons.

Mr. Rowntree: The only purpose I have, your Honor, is to show that West Kentucky Coal Company reneged on its contract. The statement of Mr. Mark Eastin in his prior deposition—

Mr. Kramer: That is the one read here.

Mr. Rowntree: I did not understand it at the time he made it, and it may be there is some explanation for it, and I don't believe that Mr. Mark Eastin intentionally mistated something.

The questions were these: "Did West Kentucky Coal Company ship coal on the contract that you referred to to Tampa Electric Company?"

"Answer: No coal was ever shipped on that contract."

And I asked him: "Was the contract rescinded?"

1800 "Answer: It has been cancelled by letter from Tampa Electric Company."

I think there might be some explanation for that answer.

Mr. Rowntree: The pleadings in this case clearly show that West Kentucky Coal Company and Nashville Coal Company decided not to ship coal on that contract because they say—

The Court: Violation of the anti-trust laws.

Mr. Rowntree: That is right.

The Court: Can't you men stipulate on that?

Mr. Combs: It seems to me we should be able to, your Honor.

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1805 (Thereupon, the jury returned to open Court and the following further proceedings were had in the presence of the jury.)

Mr. Rowntree: Ladies and gentlemen of the jury, it is stipulated by and between counsel that there was a contract assumed by West Kentucky Coal Company to ship coal to the Tampa Electric Company in Florida; the original contract having been made back in 1955; the assumption of the contract being made at the end of 1955; the contract call-

ing for the shipment of the requirements of the Gannon Steam Plant of Tampa Electric Company; the coal to be of a quality of 11,800 BTU; the term of the contract to be twenty years; the price of the coal to be \$6.85 per ton delivered at the Tampa unloading dock; that a lawsuit was filed by Tampa Electric Company, September, 1957, in the Federal Court at Nashville, Tennessee, suing the West Kentucky Coal Company, and its affiliate companies for breach of contract in not shipping coal to Tampa; and the West Kentucky Coal Company and its affiliates took the position in that lawsuit that the contract was illegal because it was in violation of the anti-trust laws.

Mr. Kramer: Now, I think Your Honor was going to state what happened to the lawsuit, and then we were going to read the decision of the Supreme Court.

The Court (To the Reporter): Do you have that?

The Reporter (Reading): The West Kentucky Company claimed that Tampa, binding them over a period of twenty years to ship coal at a certain price, and that that was fixing the price over that period of time and monopolizing the market over that period of time, and the Court at Nashville held that West Kentucky was correct in its contentions.

The Court of Appeals, by a two to one decision, 1807 the majority opinion being written by Judge Shackelford Miller, affirmed the lower Court. Judge Weick wrote a strong dissenting opinion, and the case reached the Supreme Court of the United States, and the Supreme

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Court, by an opinion, I believe of Justice Clark, held that the Circuit Court was wrong, the majority opinion was wrong, that the minority opinion was right, although they gave different reasons. Some of the reasons given by the Supreme Court were different from the reasons given by Judge Weick.

The Court: The whole point in the description of the case through the Courts is that the final Court, which is the Supreme Court of the United States, held that that contract did not violate the anti-trust laws, that the Western Coal Company was required to perform the contract since it was a legal and valid contract.

Mr. Kramer: Your Honor meant West Kentucky.

The Court: Yes, that's right.

Mr. Combs: Now, as a part of the stipulation, ladies and gentlemen of the jury, I am going to read part of the facts as found by the Supreme Court of the United States with reference to this particular contract we are talking 1808 about.

Your Honor, I would like to point out to the jury for clarification, before I read that, that this contract was originally made by Nashville Coal Company, one of the subsidiaries, a towing company, before it became a part of the West Kentucky Coal Company. West Kentucky Coal Company did not negotiate this contract. The records will show that.

Now, picking up, Your Honor, a description of the contract we are talking about:

"The original contract was with Potter Towing Company, and by subsequent agreements with Tampa Electric responsibility thereunder was assumed by respondent West Kentucky Coal Company."

"The agreement, dated May 23, 1955, embraced Tampa Electric's total requirements of fuel . . . for the operation of its first two units to be installed at the Gannon Station

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... not less than 225,000 tons of coal per unit per year,' for a period of 20 years. The contract further provided that 'if during the first ten years of the term ... the Buyer constructs additional units (at Gannon) in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract' It was understood and 1809 agreed, however, that 'the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same.' Tampa Electric had the further option of reducing, up to 15%, the amount of its coal purchases covered by the contract after giving six months' notice of an intention to use as fuel a by-product of any of its local customers. The minimum price was set at \$6.40 per ton delivered, subject to an escalation clause based on labor cost and other factors. Deliveries were originally expected to begin in March, 1957, for the first unit, and for the second unit at the completion of its construction.

"In April 1957, soon before the first coal was actually to be delivered and after Tampa Electric, in order to equip its first two Gannon units for the use of coal, had expended some \$3,000,000, more than the cost of constructing oil-burning units, and after respondents had expended approximately \$7,500,000 readying itself to perform the contract, the latter advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered. This turn of events 1810 required Tampa Electric to look elsewhere for its coal requirements. The first unit at Gannon began operating August 1, 1957, using coal purchased on a temporary basis, but on December 23, 1957, a purchase order contract for the total coal requirements of the Gannon Station was made with Love and Amos Coal Company. It was for an indefinite period cancellable on twelve months' notice by

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either party, or immediately upon tender of performance by respondents under the contract sued upon here. The maximum price was \$8.80 per ton, depending upon the freight rate. In its purchase order to the Love and Amos Company, Tampa estimated that its requirements at the Gannon Station would be 350,000 tons in 1958; 700,000 tons in 1959 and 1960; 1,000,000 tons in 1961; and would increase thereafter, as required, to 'about 2,250,000 tons per year.' The second unit at Gannon Station commenced operation 14 months after the first, i. e., October 1958. Construction of a third unit, the coal for which was to have been provided under the original contract, was also begun."

Ladies and gentlemen, that is our part of the stipulation that I read to you in connection with the contract.

The Court: Now the parties have stipulated that the things that you have just heard from counsel are 1811 facts, and the jury will find those to be facts.

By Mr. Rowntree:

Q. Now, Mr. Amos, did you hear about the need of Tampa Electric Company for coal? A. Yes, sir.

Q. About when was that? A. In April or the first of May, it became generally talked among the coal trade that —

Q. Of what year? A. Of 1957, that West Kentucky had refused to ship on their contract.

Q. What did you do when you heard about it? A. I went to see the president of the Tampa Electric Company to see if it was possible to work out something to ship rail coal in there.

Q. What was his name, the president of Tampa Electric? A. W. C. MacInnes.

Q. How did he receive you down there? Was he interested?

Mr. Kramer: Now, Your Honor, we object to negotiations — I take it you say "you", you are talking about Love and Amos Coal Company.

The Witness: Yes, sir.

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Mr. Kramer: And Tampa Electric Company.

1812 The Court: I sustain that objection.

By Mr. Rowntree:

Q. What was the result of your conversation with him? A. Well, I had a number of conversations.

Q. Yes, sir. A. The result of the first conversation was that he gave me an order for a hundred —

Mr. Kramer: Your Honor, of course, we object to that as being irrelevant and immaterial in this lawsuit. The fact that Love and Amos sold some coal to Tampa Electric, we don't think has anything to do with the issues in this lawsuit. We say it is irrelevant and immaterial.

Mr. Rowntree: If your Honor please, this is a struggle for a market, the only strong market that this section had available, and this is the struggle for that market, and that is what is going into the record.

The Court: Well, the Court holds that the testimony to the effect that he obtained orders is competent.

By Mr. Rowntree:

Q. Will you answer? A. The result of that first visit was he gave me an order for — a spot order for a hundred thousand tons of coal to be shipped as rapidly as he could unload it. He had no facilities at that time to unload rail coal.

Q. Was this Tampa coal to come by water from West Kentucky? A. The contract was, yes, sir. There weren't any rail facilities available at the time I am talking about.

1814 Q. The contract for 100,000 tons was to go by rail?

A. Yes, sir.

Q. Go ahead. A. We started shipping on that contract the early part of May of 1957.

Mr. Kramer: Now, your Honor, we want to renew our objection as going beyond your Honor's previous ruling.

So there will be no question about it, your Honor ruled he could show that he received an order, and now they are going ahead to show shipments, and we object to that as

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being irrelevant and immaterial for any purpose in this lawsuit.

The Court: Now you propose to show what happened?

Mr. Rowntree: Yes, sir.

The Court: The Court holds that is competent, what happened after those orders, if anything.

Mr. Kramer: May the record show our continuing objection so I need not make it to every question.

The Court: Yes, sir.

By Mr. Rowntree:

1815 Q. Where did you ship that coal from? A. From east Tennessee and southeast Kentucky.

Q. And what period of time did those shipments cover? A. I think, as I remember, we started in early part of May — May 7th or 8th, and we finished the latter part of September of 1957.

Mr. Rowntree: May the record show that among the items of tonnage shipped by Phillips Brothers in the records previously exhibited, there were 2,763 tons shipped by Phillips Brothers in that period to Tampa, Florida.

By Mr. Rowntree:

Q. Now was this a temporary contract you had? A. Yes, sir. It was a spot order.

Q. What did you do about going about obtaining a more permanent basis in that market? A. Well, the freight rate from these mines in this section of the country to all points in Florida at that time were \$6.30 per ton. There was an additional charge from the yards at Tampa, Florida to this plant of 57 cents a ton on account of the fact it had to be moved by a small railroad.

1816 Q. Let me ask you, Mr. Amos, did you go see the L & N Railroad, the Seaboard Railroad, the Southern Railroad and Atlantic Coastline? A. I did.

Mr. Kramer: Your Honor, we are going to object because any effect to obtain freight rates is not, in our opinion and under the decisions of the Noerr case or other cases, is not

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a violation of the Act. But any shipper has a perfect right at any time to go to the railroads and seek a lower rate, either direct to the railroad or through the Interstate Commerce Commission.

Whatever he may have done does not have any tendency to prove — done in this respect, does not have any tendency to prove a violation of the Sherman Act, and we object to it.

The Court: Unless it has some bearing on the market, on the attempted monopoly of the market.

Of course, it is perfectly proper for any citizen to negotiate with the railroads about freight rates and those things in and of themselves are not violations of any law.

1817 By Mr. Rowntree:

Q. Did you obtain a rate that would be competitive with water shipments to Tampa?

Mr. Kramer: For the reasons already given, the same objection, your Honor.

The Court: Overruled.

The Witness: Yes, sir, I did.

By Mr. Rowntree:

Q. And when was that rate effective? A. December 23, 1957.

Q. Now in the meantime was West Kentucky Coal Company still interested in the Tampa market? A. Yes, sir.

Q. What did they do down there?

A. The West Kentucky Coal Company, at the time I was in Tampa, at first, maintained a gentleman named McCarter whom I had known previously. They were keeping him there and he was soliciting spot business from the Tampa Electric Company at a higher price than his contract did.

1818 Q. Did the West Kentucky ship coal into Tampa during this period we have already covered? A. During the same period that I was shipping the 100,000 thousand tons, they shipped 115,000 tons on a spot order.

Q. By water? A. By water; yes, sir.

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1824 Q. Mr. Amos, when was your contract made with Tampa Electric Company? A. December 23, 1957.

Mr. Rowntree: We will enter a copy of that as the next exhibit.

Mr. Kramer: All of which is subject to our previous objection.

The Court: Yes.
(Exhibit No. 110 was marked for identification and filed.)

Mr. Rowntree: This contract, the substance of it was read in connection with the Supreme Court statement of facts, I believe.

Mr. Combs: Yes, your Honor, and that is part of our stipulation and I thought that was going to cover this.

1825 Mr. Rowntree: It calls for the tonnage stated before in connection with the Supreme Court statement of fact.

(Exhibit passed to jury.)

By Mr. Rowntree:

Q. The shipments under this contract, where were they to come from? A. From the same territory, that is east Tennessee and southeast Kentucky.

Q. In January 1958 did you give a deposition in the case of Osborne Mining Company against United Mine Workers in which this contract was exhibited? A. Yes, sir.

Q. Now what happened down at Tampa after that?

Mr. Kramer: Now, of course, your Honor, we object to that for reasons heretofore given. We are getting into other litigation.

The Court: Are you asking what happened to him?

Mr. Rowntree: Yes, sir.

The Court: I will let him answer, but, Mr. Amos, don't quote what anybody told you or anything like that. That is hearsay.

I will let you state what happened to you, what happened

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to your business, if anything.

1826 By Mr. Rowntree:

Q. What did you see down there and what happened?

The Court: State it of your own knowledge, please, Mr. Amos.

A. Within a week or two after that contract was filed as an exhibit, the West Kentucky Coal Company moved out and took their representative away; the Peabody Coal Company moved their representatives in. They moved a man in permanently.

By Mr. Rowntree:

Q. Did you see officials of Peabody Coal Company down there during that period of time? A. Yes, sir.

Q. Who did you see down there? A. Mr. Kelce, two of the vice-presidents, and the man in charge of their water transportation.

Q. Who is Mr. Kelce? A. He is president of Peabody Coal Company.

Q. Did you have an understanding with Tampa Electric Company that they could experiment with water coal? A. Yes, sir. They reserved some tonnage for experimental purposes.

1829 By Mr. Rowntree:

Q. Mr. Amos, after you saw the Peabody Company officials in Tampa shortly after January, 1958, did Peabody Coal Company ship water coal into — that is coal by water into Tampa Electric Company in the year 1958. A. Yes, sir, later in the year.

Q. And how much coal did they ship? A. A hundred and fifty thousand tons.

Q. In the — did Peabody Coal Company then make a contract with Tampa Electric Company for — that is, a permanent contract?

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1830 Mr. Rowntree: If Your Honor please, the contract is already in evidence. Perhaps I shouldn't have asked the witness.

The Court: Oh, well.

Mr. Rowntree: This is Exhibit 79, and I would like to call attention at this time to the tonnage in the Peabody contract to Tampa Electric Company made February 16, 1959.

The tonnage, 1959, 100,000 tons.

1960, 550,000 tons.

1961, 800,000 tons.

1962, 1,000,000 tons.

1963 through 1979, 1,250,000 tons.

Mr. Kramer: Now, of course, Your Honor, that is not in the same light as the question heretofore asked. That was a contract that was put in. We have an objection to that which we continue, of course, but, Your Honor, that is a contract for coal and not a report of deliveries of coal.

Mr. Rowntree: That's correct, that is the contract.

Mr. Kramer: And the question that was asked
1831 when I started my objection was the amount of coal delivered. I continue that objection. That is a different proposition.

The Court: Now, the Court holds that he may answer as to how much coal Peabody delivered to Tampa, if he knows personally, but not by hearsay.

You may answer that, Mr. Amos.

The Witness: Yes, sir, the spot order was for 150,000 tons.

By Mr. Rowntree:

Q. And that was in the year '58? A. That's right, starting in June, I think.

Q. And this contract was at the beginning of 1959.

Did your shipments to Tampa, after these water shipments of coal, amount to the tonnage called for in your contract with Tampa Coal Company?

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Mr. Kramer: Now, just a moment, Your Honor, of course we object to that. That is a conclusion — I don't know what —

By Mr. Rowntree:

Q. Is this a resume of the tonnages delivered by you to Tampa in the period of 1957 through 1960 to the present time?

1832 Mr. Kramer: Your Honor, we want to continue the objections heertofore made. I take it it is not necessary to restate them.

The Court: No, sir.

Mr. Kramer: All right, sir.

By Mr. Rowntree:

Q. Your answer is yes? A. Yes, it is.

Q. We ask that that be marked as next exhibit.

(Exhibit No. 111 was marked for identification and filed.)

By Mr. Rowntree:

Q. Mr. Amos, the date of that Tampa contract is February 16, 1959. Did you receive a letter from Tampa Electric Company on or about March 26, 1959? A. Yes, 1833 sir.

Q. Is that a copy of it? A. Yes, sir.

Mr. Kramer: Your Honor, we object to the introduction of this offered exhibit. It is irrelevant. It is immaterial. We think it is incompetent for any purpose connected with this lawsuit, Your Honor.

(The proffered exhibit was handed to the Court.)

The Court: Sustained, you may put it in the record for identification purposes. Sustain the objection, not on the ground that is indicated by Mr. Kramer, however. It is sustained because it is a communication —

Mr. Kramer: It is hearsay.

The Court: In the nature of a self-serving communica-

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tion, and the best evidence would be the evidence of the man who wrote the letter.

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1834 (Exhibit No. 112 was marked for identification only.)

Mr. Rowntree: May I ask this, Your Honor.

By Mr. Rowntree:

Q. Mr. Amos, will you state whether or not in order to continue to ship coal to Tampa after March, 1959, you had to take some other step with respect to your cost to Tampa?

A. Yes, sir.

Q. And what was that? A. We made a reduction —

Mr. Kramer: Now just a moment. Your Honor, because conditions changed, and he changed his methods of shipping, I can't see where that is material to this lawsuit. I just can't follow that. I object to that on the materiality.

The Court: It may not, but I will let him answer it.

The Witness: We made a reduction in our price.

The Court: Now the Court holds that that is competent. It may have, it may not have, some bearing on the basic issues in this case, but the jury may consider it for whatever bearing it has on such issues.

1835 By Mr. Rowntree:

Q. Will you state whether or not you had to take any step with respect to rail rate? A. We did

Q. What was that? A. We asked the railroads to make a further reduction —

Mr. Kramer: Now, Your Honor, we again object to this negotiating.

The Court: Sustained.

.

By Mr. Rowntree:

Q. State what happened to the rates. A. It was reduced to \$3.80 per ton.

Q. Is that a firm reduction at this time?

Mr. Kramer: I hate to keep continually objecting, Your

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Honor, but I cannot see the materiality of that. If the railroad company saw fit to change freight rates, I cannot see that the United Mine Workers or the Trustees of the Welfare Fund, that that could be held as the basis for any conspiracy.

The Court: It cannot, and the Court so instructs 1836 the jury, but the Court is permitting this testimony for whatever bearing it may have on the entire picture, that is, the picture involving the prices of coal and the alleged attempt to monopolize the coal etcetera.

Now, Mr. Rowntree, what did you have, what were the things that you had in mind on this freight rate ques- 1837 tion?

Mr. Rowntree: This Peabody contract came and this heavy tonnage into Tampa in spite of Love & Amos' contract for their supply of Tampa. Then Mr. Amos had to reduce his price, then he had to get a second reduction in the freight rate which is not yet completely resolved, and the struggle is still going on.

The Court: Well, it is offered for whatever bearing it may have on the alleged monopolistic feature involved in the case; is that the point?

Mr. Rowntree: Yes, sir.

Mr. Kramer: May I state my objection a little further.

Your Honor, the fact that Mr. Amos, or his company, or somebody else, was attempting to get lower freight rates, which, of course the Court has judicial knowledge, and is a matter of common knowledge, is always going on — the thing I can't understand as your Honor knows, there is always a fight for lower rates by the shippers and the railroad companies or the barge companies, whoever it may be, are always insisting the rates are too low, and the fact he did make an application for and did obtain a lower freight rate, I can't see where that would be an element of conspiracy that the United Mine Workers would be 1838 a party to.

The Court: That alone, Mr. Kramer, has no sig-

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nificance insofar as the Court can see, but it may have some bearing when it is put into the entire picture on this price question.

The Court is not indicating it has any significance, but the Court feels it should let it go into the record for whatever bearing it has on the monopolistic issue, if any.

* . . . *

By Mr. Rowntree:

Q. Mr. Amos, is Tampa Electric Company the first sizable market in Florida for coal? A. Yes, sir, it is.

Q. Is Florida a potential great market for coal? A. I think so; yes, sir.

Q. If the coal moves by rail where will the coal come from to Florida? A. East Tennessee and east Kentucky.

Q. If the coal moves by water who will ship the 1839 coal? A. West Kentucky is the only people who have shown any interest.

Q. What about Peabody Coal Company? A. I mean the west Kentucky field.

Q. Now what proportion of your contract is being shipped at the present time?

Mr. Kramer: Now, your Honor, we are going to object to that.

Mr. Rowntree: All right, we will refer to the contract.

I would like to point out this, the contract between Tampa and Love & Amos called for 350,000 tons in 1958.

Love & Amos Coal Company shipped 248,000.

The contract called for 700,000 tons in 1959. Love & Amos shipped 476,000.

The contract called for 700,000 tons in 1960. Love & Amos shipped 252,000.

The contract called for 1,000,000 tons in 1961, and Love & Amos is shipping at the rate of about 180,000 tons for the year.

By Mr. Rowntree:

Q. Mr. Amos, why didn't you ship more tonnage as the

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contract called for? A. The water coal was taking 1840 the business.

-Q. Mr. Amos, what kind of a steam utility market or steam coal market was there in the east Tennessee Coal field in the period 1950 to 1954? A. My recollection is that it was dull during that period.

Q. Can you explain why it was dull? Was it a good steam market in the area? A. No, there wasn't.

Q. Can you explain why? A. The production of electric — the electric production was just beginning to start.

Mr. Kramer: What year are we talking about?

The Witness: '50 to '54, as I understood you.

Mr. Rowntree. That is right.

A. (Continuing) The Widows Creek plant was built in that time. The big plant was put in production, I think in 1955. That plant alone burned about 4,000,000 tons of coal a year.

By Mr. Rowntree:

Q. How was electricity generated in the area before the steam plants? A. In small plants and with hydro.

Q. Did TVA have a large hydroelectric system? A. Yes, sir.

1841 — Q. And that did not consume coal? A. That is correct.

- Q. What about the other areas of the country, were they generating electricity by hydro or by coal? A. You mean the other areas of Tennessee?

Q. The other areas of the country. The northeast, the middlewest. A. They were mostly steam and hydro.

Q. Now Mr. Amos, are these books commonly used in the coal selling business with respect to the selling of coal for steam utility use? A. Yes, sir, they are generally referred to in the coal industry as the Bible on utility use.

Q. Was this chart developed —

Mr. Kramer: Those books we have not seen and they have not been identified further than just "these two books,"

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and I don't know what they are. Some mention about the Bible. Maybe they are the Old Testament or the New, or something else, I don't know. But I would like to know what they are.

Q. Were they books prepared by the National Coal Association? A. They are; yes, sir.

Q. What is the caption of the first book, the big 1842 book? A. "Trends in Electric Utility Industry Experience, 1946-58, Comparative Coal, Oil, and Gas Consumption Statistics, and other Related Data Pertaining to the Generation of Electric Power."

Q. What is the caption of the second book, the smaller book? A. "Steam Electric Plant Factors 1958. Comparative Coal, Oil, and Gas Consumption Statistics and Costs and other Related Data Pertaining to the Generation of Electric Power."

Q. Is there any other source to obtain the information that is contained in those books? A. My understanding is that all of this information is assembled by the National Coal Association from the information in the Federal Power Commission's files.

1843 Q. Is it the only accumulation of information in use? A. The only one that I know of, sir.

Mr. Rowntree: We would like to offer those books, your Honor, the bigger one as the next exhibit, the smaller as the succeeding exhibit.

1844 The Court: You shall have that reservation.
(Exhibits No. 113 and 114 were marked for identification and filed.)

Mr. Combs: May it please the Court, I expect that counsel is trying to prove the relevant competitive market in
1845 this section. I would like to point out that in Justice Clark's decision in the Supreme Court that this question was decided by the court, the relevant competitive market as related to that Tampa Power contract, and in

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that finding by the Supreme Court he pointed out that there was about 700 producers in that effective market area, and then the justice goes into the tonnages, who sells the coal, and all in a comprehensive way.

The figures that the court uses are taken from the United States Bureau of Census and United States Mineral Industries.

Now the only thing I am pointing out at this time, it seems to me that this exact thing was before the court and what is the relative competitive market in the Tampa, Florida area —

Mr. Rowntree: We are going by TVA market.

Mr. Combs: We started out with the Tampa contract and it certainly isn't clear to me, and I don't believe it would be clear to the jury, if you start out talking about a Tampa contract and keep on that, and then suddenly it becomes the TVA market.

Mr. Rowntree: We can start on a new subject any time, and we are starting on a new subject.

Mr. Combs: That is the only reason I was calling 1846 attention to this, and I think the court has already decided this question of competitive market as far as utilities are concerned in the Tampa and adjoining areas.

The Court: The Court recalls what Justice Clark said in that opinion. If you gentlemen want to stipulate about that, it is agreeable with the Court.

Mr. Combs: I think that was the finding of the Court as far as this Tampa contract and all that was concerned. That was exactly what was before the Court.

Mr. Rowntree: I don't know exactly what the Supreme Court held in that case. The Tampa market is not what we are offering this evidence for. I think the proof in this case shows who the competitors were for the Tampa market, and I don't know what additional benefit we will get out of the Supreme Court's opinion but I will be happy to stipulate on it, whatever relevancy it has to Tampa market.

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Mr. Combs: I might say this, as far as counsel is concerned, that the testimony of the witness does not compare with the findings of the court. That is my whole point.

Mr. Rowntree: In what respect?

1847 Mr. Combs: In this respect. I believe the witness testified it was a very limited market, a very limited number of competitors, and yet Justice Clark says that the market in the Tampa area and utilities area covers over 700 producers, producing coal in seven states, and then it goes ahead to give the tonnages for the various years, 1954 up through the time this was before the court.

Mr. Rowntree: You mean he held those number of producers were shipping coal to the Tampa market?

Mr. Combs: That the relevant competitive market in the Tampa area consisted of —

Mr. Rowntree: You mean he was holding that all those people were shipping coal into Tampa Electric Company?

Mr. Combs: No, he was holding that it was a relative competitive market that they were talking about, not the peninsula of Florida but the peninsula of Florida together with Georgia, and that the relative competitive market in that case is, as he described it — and if the Court would like and counsel would like, I would be glad to read what the court said.

Mr. Rowntree: What we need to know is what do they mean by relevant market. What do they mean by
1848 that?

Mr. Combs: I think what the court meant by it is what we what we think that you have to establish in your case that the competitive situation has to be related to the market of where you are trying to get a monopoly. If you are claiming that the monopoly consisted of a national situation that affected your client in this particular way, that is one thing.

Mr. Rowntree: That is what we are claiming.

Mr. Combs: If you are claiming TVA market and these other markets, I don't know how you segregate it.

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Mr. Rowntree: I don't think the relevant market has a thing to do with a national conspiracy, your Honor.

Mr. Kramer: We were talking a minute ago about the competitive market in Florida. I don't know, he says he is about to change. What the proof has been in the last few minutes has been the competitive market in the Florida area, and that we were freezing out or that there was a combination attempting to freeze out, if you want to use that language, or monopolize that Florida market. Now what we are saying is that the Supreme Court of the 1849 United States said that there are 700 producers who are relevant producers for that Florida market. And it isn't just freezing out to monopolize one or two people. In order to do it, you have 700 coal producers down there and we say that that establishes by the Supreme Court of the United States the relative number of producers that are involved in the competitive market supplying the Florida area, and that it is not merely West Kentucky and one or two others, Peabody or somebody else, but here are 700 producers down there that are selling in that market. And to monopolize, you have got to substantially affect that group of producers.

Mr. Rowntree: Of course, we are not claiming a monopoly.

The Court: Is there any objection to your reading right there what Justice Clark said about it? Any objection?

Mr. Rowntree: No, sir.

1850 Mr. Combs: Now, the Justice is talking about the Tampa area and the Tampa contract. That is the issue, whether or not that that contract constituted a monopoly of that particular market. The Justice is talking about the relevant competitive market in that area, and here is what he says:

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"While the relevant competitive market is not ordinarily susceptible to a 'metes and bounds' definition"—and then he cites cases—"It is of course the area in which respondents and the other 700 producers effectively compete."

"The record shows that like the respondents, they sold bituminous coal 'suitable for (Tampa's) requirements,' mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximately total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market. Of the latter amount some 78,716,000 tons 1951 were sold to electric utilities. We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States."

And then he, in a footnote cites the states.

"We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years.

"In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including, presumably, the coal used by the petitioner. The coal continued to come from at least seven States. From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1% is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year

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would be .77%."

1852 Now, Your Honor, I think that all the testimony covered by this witness up until now has related to this fact here.

Mr. Rowntree: It is related to the Tampa Electric Company market.

Mr. Combs: That's right. That's right.

Mr. Rowntree: And of course, we do not claim that anybody has attained an actual monopoly of that market. This case deals with an actual monopoly claim, a claim that a contract — not a conspiracy, but a contract — gave a monopoly to a market, to a particular seller.

We claim in this case that there was a conspiracy to monopolize. In a conspiracy case, you don't get into relevant market. You get into relevant market where you have a contract, question of monopolization by contract, by an individual seller, but a conspiracy to monopolize never gets into the relevant market question, and I doubt if you can cite a case where the conspiracy question arises in a —

Mr. Combs: I don't think counsel is right, and I certainly think that the testimony that counsel was eliciting from this witness here could only relate to what we are talking about here, a relevant market. If it doesn't relate to that, I don't know what the benefit of it would be. It

1853 is the competitive situation that is involved.

Mr. Rowntree: The relevant market —

Mr. Combs: They conspire to change that competitive situation.

Mr. Rowntree: The conspiracy was to take a — a portion of this conspiracy we are talking about is to take this Florida market. The Tampa Electric Company is the frontier of that market. The conspiracy to monopolize gives a cause of relief regardless of the actual attainment of the monopolization.

We say that the market that was attempted to be monopolized is not limited to Florida, it is not limited to TVA. It is a monopoly that exists throughout the country. We have

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to provide evidences of that conspiracy wherever we can find them and wherever we meet them, and can produce evidence on them.

We say that in Florida we have encountered evidence of it as shown by the proof here. The market we are dealing with is not some vague expression about "relevant market," it is the Tampa Electric Company, and in the final analysis of proving conspiracy, you have to deal with practical economics, a seller and a buyer, and we have shown the buyer here, the Tampa Electric Company, and what has been done with respect to that buyer, and we are 1854 proving a conspiracy case here, and not a monopolization by contract, by an individual seller, and it is only in that latter area that you get into the relevant market question.

Mr. Combs: Now, Your Honor —

Mr. Rowntree: In further explanation, Your Honor, you can see that a lot of contracts are made with exclusive dealership for exclusive sales. Every one of those contracts are not invalid. It is a question of how much of the market they monopolize, and that is the kind of case you get into in the relevant market question. It is not in a conspiracy to monopolize a particular market, a big market like TVA. It is certainly not a question in a case for a national conspiracy to monopolize, a national conspiracy to restrain trade, and no such case as that can counsel cite a case where relevant market comes into question.

Mr. Combs: Your Honor, I want to point out up until now the witness has been testifying on where Tampa could get their coal. As I understand his testimony, they could only ship it by rail in a limited fashion. Justice Clark wrote that that wasn't so, that Tampa had this whole market to buy coal, and that that was a relevant area.

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1855 By Mr. Rowntree:

Q. Mr. Amos, is that chart prepared from figures

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of the last two exhibits? A. Yes, sir.

Mr. Rowntree: I would like to offer this as the next exhibit.

(Exhibit No. 115 was marked for identification and filed.)

1856 Mr. Kramer: Your Honor, as a part of this exhibit there seems to be an attempt to show, as counsel termed from these books that have been filed yesterday, two preceding exhibits coal produced and utility use and cost of coal produced in the states of New York, Pennsylvania, Illinois, Ohio, Indiana and Tennessee. And, your Honor, we do not see the relevancy of that portion of this exhibit and we are going to object to that on the ground of irrelevancy.

The Court: What is the purpose of this testimony?

Mr. Rowntree: This is on the development of the TVA market — the growth of the market.

The Court: All right.

Mr. Kramer: Our answer is, your Honor, that
1857 TVA is not in Pennsylvania, TVA is not in New York, and we don't say that is the basis of my real objection, if this is for the TVA market. TVA doesn't sell a kilowatt of electricity there and it doesn't buy coal there, and the testimony of Mr. Hill they read the other day says that Pennsylvania is outside of their market, and he said "We don't buy coal from Pennsylvania" — and he mentions the states that he doesn't buy coal from, and I don't know about New York but he mentioned Pennsylvania. I don't see where the relevancy is.

The Court: Is it a question of comparison?

Mr. Rowntree: Yes, sir. Price comparison of TVA, the growth of — the tremendous growth of TVA with other coal producing states, how the price compared with TVA. This question of price is a matter of economics, and we say this price was depressed in TVA. We attempt to show why it was depressed.

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The Court: By comparing the price here and other areas?

Mr. Rowntree: That's right.

The Court: Where coal is used?

Mr. Rowntree: That is right. Where there should be a lower price than what we have here. Show the con-
1858 traſt.

The Court: And that is the sole purpose of this exhibit?

Mr. Rowntree: That is correct.

The Court: It is admitted for that limited purpose, or for those limited purposes.

Mr. Kramer: While the Marshal is placing the exhibit which has just been admitted on the board, it doesn't seem to have on there any dates.

Might we ask counsel — well, it is over on the lefthand column, and evidently -----

Mr. Rowntree: I think each column has dates in it except the last column, which is all 1957.

Mr. Kramer: I see where the dates are. Are these dates — may I ask counsel another question. This book that I hold in my hand, which is Exhibit 114, bears date, 9th Edition, July, 1959, and the other one, which is Exhibit 113, bears date of 1960 without the month being shown, at least on the front page.

Do these books, not having an opportunity to examine them, give these figures back to 1951?

1859 Mr. Rowntree: That is right.

1860 Mr. Rowntree: This says, "U. S. Tons of Coal for Steam Electric Utilities." That 1951 figure the book shows is not available. That figure is not available, '51.

Mr. Rowntree: 1952, the use of steam coal in steam electric utilities, 104,000,000 tons. You can see the figure as they grown down to 1958, 152,000,000, which, I think, represents a growth of 50 per cent in that period, 1952-1958, for

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the country as a whole.

1861 The Court: Growth of coal, you say ----

Mr. Rowntree: The use of steam coal in the electric utility industry.

The Court: Has grown from how many tons?

Mr. Rowntree: From 104-million tons in 1952 to 152-million tons in 1958.

The Court: All right.

Mr. Rowntree: In Tennessee, starting in 1951, there were 1,103,000 tons used in the steam electric utility business.

Mr. Kramer: You are talking about tonnage consumed and not tonnage purchased?

Mr. Rowntree: Tonnage consumed; right.

Mr. Kramer: All right.

Mr. Rowntree: In 1952 there was approximately 2-million tons consumed in the Tennessee steam electric market. You see the figures of the growth. Down to 1958 where it was 9,043,000 tons consumed in Tennessee steam electric market. A growth from 1952, the comparable date over here -- a growth of roughly 450 per cent as compared to 50 per cent for the country as a whole.

We take a sister state of Virginia.

By Mr. Rowntree:

1862 Q. Does Virginia produce much coal? A. About 5-million tons a year, is my recollection of it, sir.

Mr. Kramer: Well, your Honor will recall that Mr. Hill testified on yesterday as to the small percentage of Virginia coal. I don't recall those figures, but that was extremely small that entered into the TVA field.

In view of that, we think that evidence insofar as Virginia is concerned, is irrelevant and immaterial, and we are continuing the objection.

Mr. Rowntree: We are not talking about TVA exclusively. We are talking about steam electric industry, steam electric consumption.

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Mr. Kramer: Yes, but the proof that you have introduced heretofore, you say that the main growth in the consumption of coal for generation of electricity was because of the increase in the TVA market.

Mr. Rowntree: That is correct.

The Court: All right. The objection is overruled. You may go ahead.

Mr. Rowntree: Virginia, as you know, starts off 1951 at 3,440,000, but by 1958 it had grown only to 4,742,000.

The cost in 1957 — the cost at the plant in Virginia 1863 was \$8.75 per ton. 1957, Tennessee cost at the plant \$4.81.

And we point out that great difference in spite of the tremendous increase in the market in Tennessee.

Mr. Kramer: That is argument. We object to that argument. I don't have any objection to pointing out what is on there, but I object to argument.

The Court: The argument is not evidence and will not be considered by the jury as evidence. But counsel on each side has a right to state his contention with respect to a certain subject.

Now Mr. Rowntree, you are just pointing out, as I understand, what the figures show on the chart?

Mr. Rowntree: That is right.

The Court: Well, he has a right to do that but he cannot argue about them at this time.

Mr. Kramer or Mr. Combs shall have the right at any time to interrupt counsel and state your position, Mr. Kramer, to the end that the jury may understand the problems that are involved better by such explanations.

Go ahead.

Mr. Kramer: May I ask counsel one question that I did not ask earlier, the figures as to the cost I didn't ask 1864 you about. Are they in these same exhibits?

Mr. Rowntree: They are in the same exhibits.

Mr. Kramer: Go ahead.

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Mr. Rowntree: In fact, that last — yes, they are. The first book — the big book.

This last exhibit sets forth the top six states in the use of steam electric utility coal in the year 1937 — a year right in the middle of this case here.

The top — well, here is the top user of steam electric utility coal, Ohio. The next is Illinois.

Ohio used 19,000,000 tons; Illinois used 18,000,000 tons; Pennsylvania used 17,000,000 tons; New York used 13,000,000 tons; Indiana, 12,761,000 tons; Tennessee is the 6th state — it has grown from this point down here to the 6th state in the use of steam utility coal.

We have on this chart the production, the coal produced in the various states which produce coal.

New York, of course, draws a blank on that. The cost in New York, a non-coal producing state with a heavy use of utility coal, \$9.89.

1865 Pennsylvania, outside of West Virginia, uses a heavy tonnage of steam electric coal with the cost of \$6.53.

And another heavy producer, Illinois, and the cost — and the same with Ohio and Indiana — all of those being far heavier producers of coal than Tennessee.

Tennessee with a great growth of steam utility market with a relative low production compared to the other heavy users with the lowest price — lowest cost at the plant of any.

1866 Q. Mr. Amos, would you tell us if the information shown on that chart with respect to West Kentucky Coal Company and Nashville Coal Company, would that have an effect on the spot coal market of TVA? And, if so, why?

A. Yes, sir, I think what you are referring to is the large tonnages of coal they are bidding on, and assuming that this is bid on a spot market, is that correct, sir?

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Q. That is correct. A. Well, bids of 60,000 tons a month would have a terrific impact on the market.

Q. Is that an unusually heavy tonnage for the spot market bid? A. Yes, sir. I don't know of anybody able to furnish that much other than the West Kentucky field.

Q. What effect would it have? A. It would have the effect of bearing down on the price heavily.

1867 Q. What exhibit is that?

A. Three B. No. 102.

1868 Q. Mr. Amos, assuming a state has a production of coal at the rate of 7,000,000, roughly, tons per year; and assuming that that state starts in 1951 with a coal use in the steam market of 1,100,000 tons and that market grows to 9,351,000 tons over a period of from 1951 to 1957 at the rate of approximately 450 per cent, whereas the country as a whole starts off with a coal consumption for utility purposes of 104,000,000 tons and grows, roughly, 50 per cent in the equivalent period of time; and assuming that the costs in a sister state, with a growth of only 1,000,000 tons over the equivalent period of time has a cost at the plant of \$8.75; and assuming that the first state we are talking about, the state that we are talking about has

1869 grown to the sixth state in the country in the use of steam coal by 1957, and that four of the other six top users of coal are among the top producers of coal and have a production rate well over twice as great as the first state; and assuming that the costs in those other states at the plant are respectively \$6.53, \$5.43, \$5.56 and \$4.91, whereas the first state cost at the plant in 1957 for steam coal was only \$4.81, state whether or not had it not been for the practice of dumping coal on the market, the price of coal for steam use in the first state would be the national average price for coal.

Mr. Kramer: Now, your Honor, we object to that.

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The Court: I sustain the objection as to the last part of the question, the very last part. The question is, do you have an opinion from the hypothetical facts given to you by Mr. Rowntree of why the price of coal in Tennessee was such and such a figure. Do you have an opinion?

The Witness: Yes, sir.

The Court: All right. Second, do you have an opinion as what the price should be in Tennessee?

The Witness: No, sir, I don't know what the price should be, but I have —

1870 The Court: Well, I will let him express his opinion as the reason why the cost in Tennessee is such and such a figure, if he has an opinion.

Mr. Rowntree: May he give his opinion as to whether or not it should be at least the national average?

The Court: He can give his opinion of what it should be. That is what I tried to ask him.

Mr. Kramer: He said he couldn't give that opinion. That is what he has sworn. I don't think counsel can cross examine his own witness.

By Mr. Rowntree:

Q. Could you give us your opinion as to whether or not it would be as great as the national average?

Mr. Kramer: Your Honor, we object to that because in all of this question, the question of markets has not been taken into consideration. It isn't a question of production within the fields. You have got to, in order to realize for figures to be worth anything, you have got to realize markets that may be involved because production may be entirely different.

The Court: I think, Mr. Kramer, with due deference to you, that that objection goes to the weight of the testimony rather than the competency.

1871 The Court holds that the witness may give his first opinion, what I asked him if he had an opinion in that first proposition and he said he did.

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Mr. Kramer: I want to object generally on the ground that the witness is not qualified to answer the facts of the question as now put.

The Court: The Court overrules the objection.

The question is whether you have an opinion for the reason that the price of the coal in the first state — he used Tennessee — he used Tennessee as the first state in his question, as I understand. Now the price was what, Mr. Rowntree, during the period of time involved in Tennessee?

Mr. Rowntree: We have Phillips price, your Honor, which followed the market pretty closely. The cost at the plant, \$4.81.

The Court: Well, I am using the price and Mr. Rowntree is using the cost.

Do you have an opinion why the cost of coal in Tennessee was at that figure that he just mentioned?

The Witness: Yes, sir. It seems obvious to me, and I am just trying to recall Mr. Rowntree's figures — he told a production of about 7,000,000 tons a year and a consumption of so many million tons. It seems to me it is obvious that there is outside pressure that would drive that price 1872 as low as it is, lower than the other states. There is some outside pressure doing it.

The Court: Now I will let you ask the second question. By Mr. Rowntree:

Q. Do you have an opinion as to whether or not the price in that state should be as great as the national average? A. Yes, sir.

Mr. Kramer: Our objection continues, your Honor.

The Court: Yes. The Court rules that is it competent as evidence for whatever consideration the jury may think it is entitled to.

Q. What is your opinion? A. My opinion is that the quality of coal from the territory you are talking about is

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1873 far superior to the national average quality of coal and that under those circumstances; that coal from your territory that you are talking about should be above the national average. I said, your Honor, that I didn't know how much:

1874 Q. Is the coal in the East Tennessee Field, particularly Campbell County, Tennessee, above the national average in quality? A. Yes, sir.

Q. How much comparatively or generally? A. This is from recollection, Mr. Rowntree. I think the national average is somewhere about eleven thousand six or seven hundred BTU, whereas the average of the coals in Campbell County that you refer to, the principal coal being the Jellico coal, will run around 13,200 BTU.

The Court: That is for what per —

The Witness: Per pound of coal.

The Court: Per pound.

The Witness: Yes. Maybe this will help you on that, Your Honor.

The Court: I don't think I can be helped on this BTU, but you can try.

The Witness: As a rough rule, the cost per cent for each one cent or pound of coal is equivalent to about twenty-five cents per ton, so that you can see the difference between eleven five and thirteen would be material.

The Court: Mr. Rowntree, the Court, in its rulings, didn't intend to cut you off from full examination of this witness. If you have any other points involved, you
1875 may have the privilege of asking the witness about them, and then as objections are made, the Court will pass on them as they are made.

The Court interrupted the witness, because the Court felt that the objection was good and sustained it. If you have any other points that you want to bring out from the witness stand, you may ask him, and if the objections are made, I will pass on them.

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Mr. Rowntree: Thank you, sir.

By Mr. Rowntree:

Q. Mr. Amos, this is a book put out by the Bureau of Mines, I believe. A. Yes, sir.

(Exhibit No. 116 was marked for identification and filed.)

1876 By Mr. Rowntree:

Q. Mr. Amos, I show you the chart there and ask you if that chart, in the left-hand column, gives the national average price of coal of 1956, 1957, and 1958, in accordance with the Bureau of Mines figures.

Mr. Kramer: What page is that report?

Mr. Rowntree: Maybe I can see it better than you can. It is page 9.

The Witness: Yes, sir. 1956, the average value per ton was \$4.82. In 1957, \$5.08, and in 1958, it was \$4.86 per ton.

By Mr. Rowntree:

Q. Now, Mr. Amos, does this show — this next chart we are about to deal with — does that show the average price of coal and show the Phillips price average for those years, and show the difference between his price and the national average, and show a figure of amount multiplying that difference in price by the tons mined by Phillips Brothers Coal Company?

Mr. Combs: May I ask a question, Your Honor?

The Court: Yes, sir.

Mr. Combs: Does that show the difference between steam coal and metallurgical, or is it both?

The Court: What about that?

Mr. Rowntree: This is the national average for all coal.

Mr. Combs: Both steam and metallurgical?

Mr. Rowntree: All kinds.

Mr. Combs: Thank you.

Mr. Kramer: Your Honor, we want to object then to it, because we do not think that the national average — in

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other words that you could establish any facts of substantive value in this lawsuit by saying that the national average price per coal — sales price of coal — that exhibit is used as “value” — I don’t know just what that means, “value per ton”, — but it says “value per ton” is so much, and then Phillips sold their coal at so much per ton. We do not think, Your Honor, that that establishes anything 1878 at all, because you have to show that the quality of their coal was equal to the national average, location as to markets was the equivalent to the national average, that the other things that would go into the establishment of the national average of value was similar before a comparison of national average and what some one isolated person would sell at.

It is irrelevant to the lawsuit. We say it is immaterial, and we object to it and say it should not be entered in the lawsuit.

The Court: What are the classes of coal? You say steam coal and metallurgical coal, and what else?

The Witness: Your Honor, I have only looked at this one page, and it shows the average price realized per ton on all coals. Of course, there are low grade coals in there and high grade, and this is the average for all of them.

The Court: What is metallurgical?

The Witness: Metallurgical coal is a special coal used in the production of steel. I don’t see that it makes any great difference. It is coal that is sold to the steel companies.

1879 Mr. Combs: As a matter of fact, I think it would make a great deal of difference. They are talking about utility coal, that is steam coal, and I think the witness and counsel will admit that steam coal sells at a much lesser price than metallurgical coal. Metallurgical coal is a higher grade of coal.

Now, you can’t distinguish how much of one or the other. I don’t see how it follows on the markets that he is trying

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to develop here. That was the point I was making. It may be for the question of other witnesses, I don't know, but I just wanted that as a matter of information.

Mr. Rayson: There's already testimony, your Honor, by other witnesses that TVA purchases inferior grades of coal, and can use them, whereas other businesses cannot. I think that was brought out by the TVA witness Hill, and I think Mr. Schmidt testified the same thing, and I think that would further eliminate any basis for comparison of what Mr. Amos is talking about with the price of steam coal paid by the TVA.

Mr. Rowntree: I think that the —

The Court: Mr. Amos, now you know about the coal business, as an operator. Do you have an opinion of whether or not the average shown in there has any relation to the type of coal that is furnished or that is purchased 1880 and used by the TVA, and as I understand the figures in the pamphlet that you have in your hand apply to all coals. It is the average price of all coals, and the proof in this case so far shows that TVA uses steam coal only, and that the TVA possibly uses coal that has slightly more impurities than the average user of steam coal.

Now in the light of what is in this record up to the present time, do those figures have any relationship to the problem at hand? The Court is asking you these questions, because the Court and the jury are not coal people. I assume the jury — not many on the jury who have had any experience with the coal business, and maybe you can help the Court and the jury on that problem.

The Witness: Your Honor, you are trying to get at what is the fair average price for all coal in the country, and I think this is a fair average price — it's figures gotten up by the government, and it is without bias.

The Court: I overrule the objection. I think the objection goes to the weight of the testimony and I will give counsel full opportunity to cross-examine. It is as to the

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weight rather than the competency.

1880A Mr. Combs: All right, Your Honor, but I just want to point out —

The Court: Yes, sir.

Mr. Combs: The witness' remarks have no relation to what I was talking about. I don't question the authenticity or the fairness of those figures.

I was simply pointing out that out of the average of 1958, I think out of four hundred and twenty million tons of coal, over three hundred million tons of that coal was metallurgical coal, and I don't think the witness or anyone else will testify that there is any fair comparison between the price that you receive from metallurgical coal and steam coal.

The Court: Mr. Combs, what figure did you use there? Four hundred and twenty million in this pamphlet?

Mr. Combs: I am speaking from memory. He has the book, but I would say in 1958, there was in excess of four hundred million tons of coal mined in this country. I think that that book reflected that. The witness might tell me.

The Witness: Four hundred ten million.

The Court: What year?

The Witness: 1958.

1881 Mr. Combs: All right, four hundred and ten million tons. Now out of that four hundred ten million tons, there was used one hundred and fifty-two million, three hundred fourteen thousand — I can't see it from here.

A Juror: Five hundred forty.

The Court: How much?

Mr. Combs: It is the last figure on the chart.

A Juror: 152,414,000 tons, this figure right here.

Mr. Combs: That was the steam coal in the utilities. That doesn't reflect the steam coal that was in some of the other markets, but this is what he is talking about. Now the rest of that was metallurgical coal.

Mr. Rowntree: All the rest of it?

Mr. Combs: Not all the rest of it, of course not, but most

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of it, a lot more metallurgical coal than what he is talking about is my point, and it is not a fair comparison.

The Court: Now, you have got —

Mr. Rowntree: Now, Your Honor, most of this metallurgical coal comes from captive mines. Have you got the proportion of that?

Mr. Combs: Now, Your Honor, to show what we 1882 are talking about, the captive mines tonnage is included in the four hundred ten million. There is no question about that. That is the total production.

The Court: Your point is that much of the coal used over the United States is metallurgical coal, and that that is a higher type coal than the coal the TVA uses, and since it is a higher type coal it brings a higher price, and by using all of these figures, all of these figures including the metallurgical coal and the prices for the metallurgical coal doesn't give a true picture of the situation involved in this suit. Is that the point?

Mr. Combs: Yes, Your Honor, and in addition to that, the question asked of the witness is whether or not the —

The Court: I sustain the objection to this testimony so far. Now I will let you go into the background of this problem with this witness, and then I will reconsider the ruling after I hear it. I think Mr. Combs has made a point there,

Mr. Rowntree.

1883 Mr. Rowntree: In the first place, we don't think the metallurgical coal was in this price. That is something we will have to develop because there is no price on the greater bulk of metallurgical coal because it comes from captive mines, and I would like to ask the witness that question.

The Witness: That is true.

The Court: You answered what? What was the question? What was the answer?

The Witness: The greater bulk of metallurgical coal comes from mines owned by the steel corporations themselves.

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The Court: All right. Are the tons listed in this pamphlet that you have in your hands?

The Witness: I don't know, your Honor. It doesn't show metallurgical coal separate. But metallurgical coal would only be relatively small portion of this 410-million tons.

The Court: And only a small portion of the average price as shown in that pamphlet, is that what you are saying?

The Witness: Yes, sir.

Mr. Combs: Of course, that is the testimony of the witness and that is his testimony. That goes to the weight.

That is not what I am objecting to.

1884 The Court: That goes to the weight and I will let it go in under that statement.

Mr. Kramer: This does not purport to show the price realized per ton for all of the Phillips coal. It is only their rail tons, and they had other sales of coal.

I do not think you can pick out a piece of coal. They were handling domestic coal and truck coal, as this record discloses, and on this exhibit there is only a portion of the coal taken for their cheaper coal and attempting to compare it to the national average.

Mr. Rowntree: We are separating the coal that we say was affected by the conspiracy. We don't claim any damages for the domestic coal. We claim damages for the steam coal.

The Court: I see. All right. The objection is overruled. Go ahead.

1885 Mr. Combs: May I make one remark. I don't want to interrupt. But that is exactly my point.

They are claiming that the coal here, and the evidence will show that is steam coal market. The captive mine tonnage and the metallurgical coal will amount to approximately a ton of coal for each ton of steel. The capacity of the steel mills at that time was 65 or 70 per cent, for instance. That is metallurgical coal. That is 65- to 70-million tons right there besides all the other production in this country.

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The witness knows what I am saying is true.

The metallurgical coal is reflected in those figures. The price of it is reflected there, your Honor. So —

* * * * *

Mr. Combs: If you will pardon me one minute.

What I was trying to say is, that the question that counsel was getting to at the time I interjected here was whether or no in the witness' opinion that the Tennessee coal should be as high or higher than the national average of coal.

Now the Tennessee coal admittedly is steam coal. 1886 The question is whether or not that steam coal should be as high as the national average that includes the metallurgical coal.

My point is, that is not a fair comparison even of an expert witness.

Mr. Rowntree: Counsel is assuming that because we are in the Tennessee Valley, because we are in Tennessee, that the steam market here should be considered lower than other parts of the country.

Mr. Combs: I do not.

Mr. Rowntree: Counsel is saying that because we are in Tennessee, and we are in the TVA market, we are bound to have a lower market than other parts of the country.

* * * * *

Mr. Rowntree: Because you see the chart on the board, your Honor, which shows a cost of coal in these other states. You can see how that one price compares with the same kind of coal in these other states.

Counsel has stated that the metallurgical coal is in this price, national average price. We say it is not. Counsel 1887 says that the witness knows it is in there. We say it is not in there.

Mr. Combs: If they are taking this position, that will be our proof.

The Court: I understand your point.

Mr. Combs: I don't want to be placed in an unfair posi-

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tion. I do not contend one single moment that Tennessee coal should be cheaper than other coal.

The Court: I understand your position.

Mr. Combs: Steam coal, whatever state it is in, is cheaper than metallurgical coal.

By Mr. Rowntree:

Q. Mr. Amos, can you state whether or not this Bureau of Mines computation of prices we were referring to before, the book of 1958, includes coal of a lesser quality than 1888 bituminous coal? A. Yes, sir. It says that it goes down to lignite. It includes lignite. As I understand, it includes all of the different qualities and grades of coal in the United States.

Q. And bituminous coal is the great bulk of the coal that is sold in the markets? A. Yes, sir.

Q. And how does the East Tennessee coal compare with the average quality of bituminous? A. All of the East Tennessee coal that I am familiar with is above the average. There are a few mines in East Kentucky in a low grade seam but they are of such small portion of the total that they don't amount to anything.

Mr. Rowntree: That chart that we started to refer to before, that you have in front of you, with respect to the national average, we offer that as the next exhibit.

Mr. Combs: Just for my information, may I inquire whether or not the witness said that included all coal. I don't believe it included anthracite?

The Witness: Bituminous, I meant. Bituminous coal and down to lignite.

The Court: What did you say, "lignite"?

1889 The Witness: Yes, sir.

The Court: What kind of coal is that?

The Witness: Coal just starting to form. There is a little mined in this country, your Honor.

The Court: All right.

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By Mr. Rowntree:

Q. Mr. Amos, will you explain where the national average figure on the lefthand column on that chart comes from?

A. It is taken from this 1958 report on bituminous coal and lignite put out by the Bureau of Mines.

Q. Which is exhibit— A. Exhibit No. 116.

Mr. Rowntree: We offer that exhibit and ask that it be passed to the jury.

The Court: All right.

Mr. Kramer: Now, your Honor, we object to this exhibit. I don't think your Honor has seen it, which exhibit will bear number 117, on the ground that no proper basis has been laid for the comparison attempted to be made by this exhibit; therefore, it is incompetent.

Mr. Rowntree: It might help the Court to see this previous exhibit Mr. Phillips introduced (referring to Exhibit No. 22).

1890 The Court: Now, Mr. Rowntree, from what information or source was the information obtained in Exhibit No. 117?

Mr. Rowntree: Exhibit No. 117 is this column here; the national average which the testimony has just been relating to, taken from the Bureau of Mines book.

The Court: All right.

Mr. Rowntree: This next column, Your Honor, is the difference between that figure here on Exhibit 22, which is the last column on Exhibit 22.

The Court: Just a question of mathematics?

Mr. Rowntree: That is right.

The Court: And it is introduced for the purpose of clarification and to help the jury to better understand the problems that are involved?

Mr. Rowntree: That is correct.

The Court: The objection is overruled.

Mr. Kramer: Of course, your Honor, we did not object on the basis of mathematical calculations.

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The Court: No, sir.

Mr. Kramer: But it is on the basis of use of the national average which we do not think is a proper method of comparison here.

The Court: The Court is of the opinion that counsel's objection goes to the weight of this testimony rather than its competency, and therefore overrules the objection.

(Exhibit No. 117 was marked for identification and filed.)
By Mr. Rowntree:

Q. Mr. Amos, can you state whether or not the thickness of seams and working conditions in mines have an effect on the operating costs of mines? A. Yes, sir, they do.

Q. What is that effect? A. Well, of course, it is natural that the cost of producing tonnage from a thin seam is going to be higher than from a thicker seam. There are other factors to be involved, however.

Q. What type seam appears in the coal fields of East Tennessee? A. Generally they are thin. They are classed as thin seams.

Q. And does such a seam adapt itself to mechanical mining? A. Not very readily; no, sir.

Q. The thickness of the seam or the thinness of a seam, does it have any effect on the operating costs in strip mining? A. Well, yes, sir, it does in strip mining and other mining too. The thinner coals, you can't get the production per man that you do out of a thicker seam.

Q. The terrain involved in mining, does it have any bearing upon costs with respect to transportation of the coal to the tippie? A. Yes, sir. Of course, in a level country your cost of transportation is cheaper than it is in mountainous country.

1893 Q. In Tennessee is there any problem with respect to the haulage of coal from pit to tippie with respect to strip operations insofar as distance or terrain is concerned? A. Yes, sir. That varies, but generally you have to

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bring that coal off a mountain or over a mountain in Tennessee, and the hauls are very much greater than they are in west Kentucky.

Q. Are there roads accessible to strip pits? A. They have to be built by the operator.

Q. Can you state whether or not that affects the production time of the mining unit? A. Yes, sir, it does.

Q. What is the effect? A. Well, it is difficult to build a road in this mountain country, and most of the strippers in this country have difficulty during wet weather or winter weather in that the roads have a tendency to fall out from under them.

Mr. Rowntree: We offer as the next exhibit page 6 of this Bureau of Mines Report for 1958, Bituminous Coal, having to do with the thickness of coal seams in coal producing states.

Mr. Combs: May it please the Court, I think it would be convenient for counsel on both sides to know that we expect to introduce as an exhibit all of these Bureau of 1894 Mines reports for, I think, from about 1941 up through 1958.

Of course, we have no objection, and those books are going to be rather numerous. They come in annual volumes. We have told counsel we expect to use those. We expect to file with our testimony each one of those books and counsel then, if he has the pages and all, it is all right to use them, if he wants to refer to them.

We have no objection whatsoever to the introduction of anything out of Bureau of Mines reports.

The Court: All right.

(Exhibit No. 118 was marked for identification and filed.)

Mr. Rowntree: We offer as the next exhibit page 41 of the same publication dealing with distance of haul, average distance of haul in stripping operations in various states.

Mr. Kramer: Which is indicated as Table 29.

Mr. Rowntree: Table 29.

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(Exhibit No. 119 was marked for identification and filed.)

Mr. Kramer: We do not object to it as the source coming from the Bureau of Mines, but I don't see any relevancy, and I am going to object to this as being irrelevant, 1895 but not as to source.

The Court: I overrule the objection.

1896 By Mr. Rowntree:

Q. Can you state what the size strip shovel dipper capacity is in the east Tennessee coal field? A. Well, that varies, sir. They use all the way from a half-yard up to five yards. My own judgment is that about a two and a half yard shovel is the most efficient under those conditions that we have up there.

Q. You are speaking about conditions of terrain? A. Yes, sir, terrain.

Mr. Rowntree: We offer as the next exhibit from the Bureau of Mines report, page 37, table 25, having to do with size of stripping equipment in various states.

Mr. Kramer: Objection continued on the ground of relevancy.

The Court: Same ruling.

(Exhibit No. 120 was marked for identification and filed.)

Mr. Rowntree: Now, if your Honor please, this next chart comes straight from the records of volumes of Bureau of Mines for 1955 and 1959, the class of mines by size in Tennessee in those two years, show a comparison, and I would like to introduce that as the next exhibit.

1897 Mr. Kramer: No objection, subject to check of the accuracy of the figures.

(Exhibit No. 121 was marked for identification and filed.)

By Mr. Rowntree:

Q. Mr. Amos, are there any real big mines in Tennessee, I mean 500,000 or over? A. Not to my knowledge, no, sir.

Q. 500,000 tons a year production or over? A. No, sir, not that I know of.

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Q. That chart shows five mines, both in 1955 and 1959, in Tennessee, with a production of 200,000 to 500,000 tons per annum. Do you have any knowledge as to what those mines are? A. What years did you say?

Q. That is 1955 and 1959, those two years. A. No, sir, I don't think there are five. I can only think of two. The Clinchfield Coal Corporation and Consolidation — Consolidated Coal Company — Consolidation Coal Company I believe it is, each have a mine that would fall in that category.

Q. The other three, are you personally acquainted with them or do you know where they would be? A. I don't know what the other three would be, unless it would be Tennessee Consolidated Coal Company, which is now 1898 closed down. The Bessemer mine, which I just saw in the paper —

Q. Don't state any hearsay. Do you know of your own knowledge that the Tennessee Consolidated Mine is down? A. Yes, sir, I know they are down.

Q. Do you have any personal knowledge with respect to any other mine in that category? A. No, sir.

Mr. Combs: May I inquire what dates they are talking about?

The Court: Yes, sir.

Mr. Rowntree: I am talking about closed as of the present time.

The Witness: I am talking about right now, yes, sir.

By Mr. Rowntree:

Q. But the other two mines besides those that you have mentioned you are not personally acquainted with, other than hearsay? A. Well, I know the mines all right, but I haven't been by to see whether they were running lately or not.

Q. All right. The next class, Class 3, shows in 1955, 14 mines in Tennessee producing 927,000 tons — 1899 Strike the previous.

Class 3 shows nine mines in Tennessee in 1955 pro-

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ducing 1,327,000 tons in 1959, two mines producing 222,000 tons.

The next class shows 14 mines in Tennessee producing 927,000 tons in 1955 and 12 mines in 1959 producing 771,000 tons.

The next two classes, Class 5, 10,000 tons to 50,000 tons per year, shows an increase in mines of 90 in 1955 to 103 in 1959. Class 6 shows a slight decline of number of mines in the category of less than 10,000 tons of 368 in 1955 to 358 in 1959.

Those two smaller categories, do you know if those mines are the same mines in 1955 as those in 1959? A. The operators are coming and going. The names are changing on those small mines constantly. The number of small mines, from my observation, is increasing, but the larger mines are going out of the picture.

Q. Do you know why these small mines keep coming back?

A. Well, it is the men and their sons who were formerly employed in these larger mines, and as they go out of the picture, they open up these small mines. They have no other place to work. That picture has been going on for a good many years now in the state.

1900 Q. Will you state whether or not there is unemployment in the coal fields of Tennessee? A. Yes, sir, very great unemployment.

Mr. Kramer: Your Honor, we do not object to this exhibit. I do not now object to it, except I want to make this statement. Of course, we do insist that nothing in the year 1959 is material to this lawsuit.

The reason I did not object to it, there is not much difference between '58 and '59. Therefore, I did not raise the question about that, but we are not waiving the objection to 1959 being immaterial.

I think you will find there is not much difference between '58 and '59, and, therefore, we did not make an objection at this time.

The Court: All right.

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Mr. Rowntree: It is our position that there is a difference in '58 and '59, the big difference being that a new contract was offered by the United Mine Workers in 1959, which had a tremendous effect.

Mr. Kramer: If you say there is a substantial difference on mines — I am talking about the exhibit — in a number of mines of these various classifications between '58 and '59, then I am going to object to the introduction of it.

1901 I think, your Honor, the facts show that there is not much difference — there may be a variance of two or three in each group, but not enough to be material in this lawsuit. As far as the number of mines, we did not object, because we think the number of mines in each of these groups by tonnage is about the same — not exactly, but about the same as it was in 1958. I think the record will so show when it is developed.

If the idea is to show a change between '58 and '59, then I want to now move to strike.

1902 Mr. Rowntree: We want to put it in for that purpose, but we want to show the decline in mines, and that is the purpose for which it is offered.

Mr. Kramer: Well, I agree that between 1955 and '58 or '58, it shows the comparative number of mines substantially, yes, Your Honor, as being correct.

The Court: All right.

By Mr. Rowntree:

Q. What is the answer then with respect to the reason for the continuance in the large number of small mines?

1903 The Witness: I thought my answer was that as these larger and so-called rail mines went out of the picture, the employees at those mines and their sons who are getting large enough to work were opening more of these small mines in order to get a livelihood.

Mr. Rowntree: We would like to offer as next exhibit

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"A Brief Report on Employment and Unemployment in the Coal Mining Industry of Tennessee," prepared by the Research and Statistics Section, Tennessee Department of Employment Security, Nashville, June 10, 1957.

(Exhibit No. 122 was marked for identification and filed.)

Mr. Combs: May it please the Court, we have no objection to the introduction of this material on its authenticity. We do object to its relevancy. We might point out it is the position of the United Mine Workers that there is a great deal of unemployment in the mining industry, there 1904 is no denial of that. It is not only in Tennessee, it is throughout the United States.

If he is going to put these out of turn, I think in our turn, we will also show that there is unemployment in the steel industry and in the rubber industry and in the rail industry. I am not sure that this case should go into these fields.

I want to point out though, that this has nothing to do with the Anti-trust Act. There is no argument here about unemployment being in the coal industry that I know of. It is all over the country,

Mr. Rowntree: Well, Your Honor please, the testimony in the record is that the United Mine Workers offers one contract to all mines, large and small. The testimony is that there is only one contract, contains the same terms for everybody, the large mechanical mines, strip mines of West Kentucky using fifty-five yard shovels and on-up to seventy-five yards. That mine has the same contract terms as these little mines where the men are trying to make a living because of unemployment.

The United Mine Workers has stated in its Organizing Committee Reports, the International Organizing Committee, that it intends to and will organize and put under contract all of the mines in the country, and we say— 1905 and they say that they have been largely successful. That includes these small mines, these little mines

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in Tennessee where the unemployed miners are trying to make a living. It includes the big mines as well.

The success of the United Mine Workers in doing that is exemplified by this case. We say, it is our position, that the intention of putting that contract on such little mines as exist in this state is part of a conspiracy to run them out of business and keep the markets for these large mines who obviously can afford to pay the contract.

I think it is equally obvious that these small mines left in the state of Tennessee cannot afford to do it. I think it is obvious to the union, and I think that the union has notice of the fact that these small mines can't pay that contract, and that the only purpose they can have in forcing the contract on these little, bitty mines is to put them out of business.

That is our position, and we say it is part of the conspiracy.

Mr. Combs: May it please the Court, of course it is the position of the United Mine Workers that that is the purpose, to organize all of the employees of the coal mines.

It's been the purpose since 1890: The people going 1906 into business are the ones to go into the business.

The object of the union is to organize the people there. They don't bring the people there.

As to the legality of it, Your Honor, we say the Clayton Act specifically exempts labor organizations from the provisions of that Act.

Now in the question of striving for a minimum wage, the same pay for the same work, has to do with elimination of competition between the human being, and we say that the United Mine Workers and other labor organizations have a right under the Anti-trust Act and under the Taft-Hartley Act to try to eliminate competition between labor as between one person and the other.

It isn't the purpose of the union to run anybody out of business. I think it is obvious to anybody that that would be to the disadvantage of the union. They are trying to help

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them and represent those people, but the question of unemployment as I pointed out a while ago, is a broad question, and of course if counsel is going to put it in and it is permitted by the Court, why we will expect, and it will be our position — so that it will be very clear — we will try to show that in the steel industry, the rubber industry, and in the railroad industry all of these industries have suffered unemployment. It's a problem that everyone is trying to solve. That was my point in relation to the unemployment in Tennessee.

The Court: I understand.

Mr. Combs: And it certainly isn't the position of the union that these little mines should operate or should not operate. They don't tell anyone to go into business, and they don't try to run them out of business.

The Court: Well, let's put it into the record.

Mr. Rowntree: I would like to read portions of this, Your Honor.

The Court: Yes, sir.

Mr. Rowntree: "This is a brief report on the unemployment situation in the bituminous coal mining industry of Tennessee. Sharp increases in unemployment in Grundy and Marion Counties—"

That is southeast Tennessee.

"—Marion and Grundy Counties in recent weeks—"

And this was put out in June, 1957.

"— have focused the attention of governmental agencies and the public upon the plight of unemployed coal miners and their families in these two areas. Since extensive unemployment has been a prevailing characteristic of all coal producing areas in the state, this review will examine the unemployment problem throughout the industry as well as for Grundy and Marion Counties.

"The Tennessee Department of Employment Security is very much aware of the extent of unemployment in this industry since most unemployed miners filed claims promptly for unemployment insurance when they lose their

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jobs. The records of the Agency have been utilized to prepare this report.

"Current Unemployment in the Coal Industry.

"Data have been brought together in Table 1 showing unemployment levels in the important coal producing counties of the State for May 1957 and for the same month a year ago."

Grundy County, May, 1956, 114 people unemployed in the coal mining industry. In May, 1957, 550.

1909 Mr. Rowntree: Marion County, May, 1956, 35. May, 1957, 216.

Anderson County, May, 1956, 500; May 1957, 600.

Campbell County, May 1956; 900; May, 1957, 1,100.

Claiborne County, May 1956, 600; Claiborne County, May, '57, 700.

I might say that their production is in here in a summary form. I might say that prior to this Grundy County and Marion County situation that arose in 1957, that the production in Tennessee, according to these figures, actually increased from 1950, 4,596,490, to 8,720,937 in 1956, and with respect particularly to Campbell and Claiborne Counties, the particular counties involved in this case here for our client, the Campbell-Claiborne County area—

"The Campbell-Claiborne County area which produced about forty per cent of the total tonnage of the state in 1950, produced only fifteen per cent in 1956. On the other hand, the Grundy-Marion County area raised its 1910 portion of the total coal production of the state from about twelve per cent in 1950 to slightly more than twenty-five per cent in 1956."

That production for 1956 was before this great increase of unemployment in those counties in 1957.

Mr. Rowntree: "Employment Declined fifty Per cent in Tennessee Coal Mining Since 1950.

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"While the coal industry was increasing its tonnage by about 100 per cent during 1950-1956, employment in the industry declined fifty per cent. This surprising difference in trends may be attributed largely to more efficient methods of mining, including mechanization, strip mining and auger mining. Higher production costs have forced operators to mechanize where possible. New strip mines have been opened up, while some of the large older and deeper mines have been shut down. These improvements have made it possible to increase tonnage and to meet competition in the industry. Along with this development has been the large scale buying of coal by TVA, a most important influence in expanding coal production in the state in recent years."

1912 Mr. Rowntree: I would like to read particularly the Campbell County figures on page 9—average monthly covered employment and annual payrolls in the coal industry in selected Tennessee counties, starting with Campbell. That is the only one we will read.

1950 average monthly employment, 1963.

1951, 1,782; 1952, 1,358; 1953, 832; 1954, 736; 1955, 802; 1956, 593.

The employment index decreased from 100 per cent in 1950 to 30.2 per cent in 1956.

Mr. Rowntree: Scott County. 1950, 382 average monthly employment.

1951, 296; 1952, 226; 1953, 160; 1954, 171; 1955, 227; 1956, 342.

The difference in employment index, 1950 100 per cent; 1956, 89.5 per cent.

Mr. Rowntree: I would like to read Claiborne County, which is adjacent to Campbell.

Average monthly employment, 1950, 1,476; 1951, 1,346;

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1952, 1,099; 1953, 602; 1954, 354; 1955, 174; 1956, 158.

1913 The employment index decreased, 1950 100 per cent to 1956, 10.7 per cent.

1914

LEON DAY

called as a witness by and on behalf of the defendants and cross-plaintiffs.

DIRECT EXAMINATION

By Mr. Robertson:

Q. Is this Mr. Leon Day? A. That is right.

Q. Have you ever worked for Phillips Brothers Coal Company? A. Yes, sir.

Q. When did you start working there?

A. Last part of '55.

Q. Had you ever worked there at all before that time? A. Yes, sir.

1915 Q. Had you ever done any mining before you went to work for Phillips Brothers? A. Yes, sir.

Q. Where had you worked? A. Straight Fork Coal Company.

1916 Q. Mr. Day, were you present at the Phillips Brothers tippie sometime in April, 1955, the time of any unusual occurrence there? A. Yes, sir, I was.

Q. Do you know the exact date of that occurrence? A. No, sir; I don't.

Q. How did you happen to be there? I don't believe you were employed at that time? A. No, sir.

Q. How did you happen to be there on that occasion? A. Visiting my father-in-law and mother-in-law.

Testimony of Leon Day

Q. Do they live there near the tippie? A. Yes, sir.

Q. And just tell in your own words what occurred there on that date. A. They just a bunch of fellows drove in and started talking —

Mr. Kramer: Just a moment. We object to this as having no relationship whatsoever to the alleged conspiracy. This is some conduct that was claimed to have happened with respect to organizing of the mine which is not in anywise connected with the conspiracy.

Mr. Robertson: Your Honor, we have charged in this case the imposition of this contract, this UMW contract upon these companies, and we are showing by this testimony how this contract was imposed upon these companies.

1917 The Court: I overrule the objection.

Mr. Kramer: Your Honor recalls the cases in line with the Apex case for the authority?

The Court: Violence has nothing to do with the issues in this lawsuit, members of the jury. This testimony is admitted for whatever bearing it may have on the question of whether or not this contract, collective bargaining agreement, was or was not used as a device to monopolize the coal business in the area of Campbell County and adjacent areas. And that is the purpose is it not?

Mr. Robertson: Yes, sir.

The Court: And the sole purpose of it?

Mr. Robertson: Yes, sir, how this contract was imposed.

The Court: All right.

By Mr. Robertson:

Q. All right, if you will just tell us in your own words what happened there on that date.

A. They just a bunch of men drove in and started talking to Mr. Phillips.

1918 Q. Is that Mr. Raymond Phillips? A. Yes, sir.

Q. Go on. A. I didn't understand what they said, but they was talking—so many of them talking at the same time, you couldn't tell.

Testimony of Leon Day

Q. Did you stay out there in the yard during the time that they were there? A. About ten minutes.

Q. Could you estimate how many came there on that occasion? A. Well, I didn't count them.

Q. Well, was it a large group? A. It was a pretty good bunch.

Q. Did you see a lot of automobiles that they came in? Were there several automobiles or not. A. Well, there was quite a few. I don't know how many. I never counted them or nothing.

Q. What did you do? You said you stayed out in the yard at ten minutes. How long did the group of men stay there approximately? A. Around 20 or 25 minutes.

Q. Where did you go after you left the yard? A. Went in the house.

Q. Did you hear anything that was said between 1919 the spokesmen for this group or any of this group and Mr. Phillips? A. No, sir, I couldn't tell you what they said.

Q. Now how long was it after this occurrence that you went to work for Phillips Brothers, a few months or a few weeks, do you recall? A. Well, over a year. I went up in Michigan and worked a while.

Q. Well, when you began working for Phillips Brothers, were you a member of the United Mine Workers of America? A. No, sir.

Q. Did you join the union shortly after you began working there? A. Yes, sir, in about three months.

Q. Why did you join, Mr. Day? A. Well, I just wanted to join it.

Q. State whether or not it is your understanding when you were employed by the union mine that you have to belong to the union?

Mr. Kramer: Just a moment, your Honor. The witness has answered why he joined, because he wanted to join.

Testimony of Leon Day

Now some understanding he may have had, unless it was something that the union told him, your Honor, it would not be competent for any purpose. I don't know 1920 what understanding, how he may have gotten it is something else. We couldn't be charged with an understanding that comes to him from some other source, some other way, and we object to it.

The Court: Yes, I think the objection is good. It is sustained. Proper foundation is not laid for it. I will let you ask him if he had an understanding, how he attained it, but you will have to connect the union with it before it would be competent evidence.

By Mr. Robertson:

Q. Mr. Day, you say you had worked at Straight Fork and been a member of the United Mine Workers before you went to Phillips Brothers. How long was that approximately? A. Well, I worked in '46 to '52.

Q. And you were a member of the United Mine Workers during those years? A. Yes, sir.

Q. Did you attend local union meetings during that time? A. At Straight Fork I did.

Q. Did you associate with other union members during that time? A. Yes, sir.

1921 Q. Do you know the impression the men in the industry had there then as to whether or not you are expected to join the union when you work for a company that has a UMW contract? A. Well, they just wouldn't let you work if you didn't join.

Mr. Rayson: Just a moment, Mr. Day.

We object to this question, your Honor. We think it would be highly irrelevant, even under the circumstances that Mr. Robertson has related. The man was operating under an entirely different contract at a different place.

The Court: You asked him about 1952, as I understand it.

Mr. Robertson: I am asking him about—he says approximately the latter part of '55 or some time in '56,

Testimony of Leon Day

whenever it was he went to work there. That is as close as he gets it. He states that he had been a union member the entire time he had worked at Straight Fork, which was from '46 to '52. Now I am asking him now about his impression whether or not he was supposed to join the union, was that his understanding.

The Court: You mean in 1956?

Mr. Robertson: In 1955 and '56.

Mr. Combs: He asked that question a while ago 1922 and he said he joined because he wanted to. He has already asked the question.

Mr. Robertson: I am trying to find out why he wanted to.

The Court: I will let you ask that question, why he wanted to.

By Mr. Robertson:

Q. Why did you want to join? A. Well, what time I worked for Straight Fork Coal Company, if you didn't belong to the union, they wouldn't let you work. I figured it was that way at Pioneer.

Mr. Rayson: We renew that objection, because what time he works at Straight Fork includes a four year period when the contract was entirely different.

The Court: I sustain the objection as to what he said about Straight Fork.

You also say what his understanding was when he worked for Phillips.

The Court: Read the question and answer.

.(Question and answer read.)

Mr. Rayson: I would say this pertains to a period of 1946.

The Court: If it does, the objection is sustained. I will let you ask him again.

By Mr. Robertson:

1923 Q. Mr. Day, was that your opinion, was that your impression at the time that you began working for Phillips Brothers?

Testimony of Leon Day

Mr. Rayson: We object to this, your Honor, on the ground that it is a leading question.

The Court: I sustain the objection.

By Mr. Robertson:

Q. Mr. Day, what was your impression at the time you went to work for Phillips Brothers in the latter part of 1955 as to the joining of the union where the employer had a union contract? A. Well, I figured if I didn't join it, they wouldn't let me work. That is the way I have been raised up to.

Q. Were there any other reasons other than this as to why you joined the union at that time? A. Explain a little bit more.

Q. Well, state whether or not you wanted welfare benefits?

Mr. Rayson: Your Honor, we object to that. That is plainly leading. He has been at this man three different ways, and he winds up with a leading and suggestive question and we object.

The Court: I sustain that. But you may ask him if he had any additional reasons for joining the union.

1924 By Mr. Robertson:

Q. All right, did you have any additional reasons for joining the union at the time you joined? A. Well, I needed the work and also I thought if I joined it, I would have my hospitalization and stuff.

Q. Did you get a UMW hospital card after you joined? A. Yes, sir, after I filled out some papers and sent them in.

Q. Do you recall how long it was after you went to work there that you joined, before you joined the union? A. About three months.

Q. Did you get a hospital card before you joined the union? A. No, sir.

1925 Q. At the time that you went to work for Phillips Brothers, did Mr. Raymond Phillips or Mr. Burse Phillips or Mr. James Pennington, anyone connected with

Testimony of Leon Day

the company ask you whether or not you belonged to a union? A. No, sir.

Q. What did you start out doing at Phillips Brothers?

A. When we first went to work, started oiling of a night.

Q. And what were you doing the last time you worker?

A. Running the loading shovel.

Q. Do you recall how much you were making at the time that you started at Phillips Brothers? A. A dollar an hour.

Q. And how much were you making an hour the last time you worked for them? A. Two and a quarter.

Q. What union are you a member of now? A. Southern Labor.

Q. Do you still have a UMW hospital card? A. No, sir.

Q. Do you expect to receive any benefits from the United Mine Workers Welfare fund? A. No, sir.

1926 Q. Now, have you continued to work for Phillips Brothers since they reorganized as a corporation at the end of 1958? A. Yes, sir.

By Mr. Robertson:

Q. What are the employment conditions in your area?

A. Well, it's pretty bad now.

Q. Does that include all industries, any industry there as well as the coal industry? A. That's right.

1927 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Day, where are you working now? A. Nowhere.

Q. Are you not working for Phillips now? A. I'm still employed, but we are out of work.

Q. How long has it been since you worked for them? A. I worked a day or two since January.

1928 Q. I believe that you gave your deposition a few months ago in this case, didn't you? A. Yes, sir.

Q. You were asked a number of questions? A. Yes, sir.

Testimony of Arlow Hutson

Q. I'll ask you at that time if you said that you joined the union because some of the men who were working for Phillips Company asked you to. A. They did.

Q. Is that right? A. Yes, sir.

Q. Are they the only people who talked to you about joining the union? A. Just the employees.

1929 Q. And did they tell you you had to join, or did they just ask you if you wanted to join? A. They just asked me to.

Q. You had never made an application for a hospital card before that, had you? A. No, sir, not under that company.

Q. And as soon as you made an application for a hospital card, you got one, didn't you? A. Well, it was a few days after I got all of my papers filled out.

Q. Yes, sir. Now, you say that you were there at the tippie in April, 1955, the day a group of men came up there? A. I was up there the day that the men come.

Q. Now, you spoke of going into a house, is this house right by the tippie? A. Yes, sir.

Q. And you walked into this house to visit with your mother-in-law and father-in-law, is that right? A. I was out in the yard.

Q. But after the men— A. I never went in the 1930 house.

Q. But after the men came, you went into the house right there by the tippie? A. That's right.

Mr. Rayson: That's all.

ARLOW HUTSON

a witness called by and in behalf of the Defendants.

DIRECT EXAMINATION

By Mr. Rowntree:

1931 Q. This is Arlow Hutson? A. Yes, sir.

Testimony of Arlow Hutson

Q. Arlow, when did you first become employed by Phillips Brothers Coal Company? A. August of 1953.

Q. August, 1953, that was a short time after they started operations? A. Yes sir.

Q. Where had you been employed before that time in the coal mining business? A. Blue Diamond Coal Company.

A. Yeah, in Campbell County.

Q. Whereabouts before that? A. Laxton Coal Company, Seatt County.

Q. Were you employed anywhere before that? A. Well, I hadn't been in the mine for several years.

Q. What happened to the Laxton Coal Company 1932 and the Blue Diamond Coal Company. A. Well, Laxton, they come out on vacation, and I quit and went to Royal Blue.

Q. And what happened to the Royal Blue? A. They shut down.

Q. Was that a big mine? A. Yes, sir, it was four hundred and something, I think.

Q. Did they ever start up again? A. No, sir.

Q. Were you a member of the United Mine Workers during those employments? A. Yes, sir.

Q. When you went to work with Phillips Brothers Coal Company in August, 1953, how long had it been since you were a member of the union? A. I hadn't been since '52.

Q. '52? A. Yeah, September of '52.

Q. You didn't have a card at that time? A. No, sir.

Q. Did anyone ask you to join the union before 1955, after you became employed at Phillips Brothers? A. No, sir.

Q. Did any field representative come around to 1933 see you? A. No, sir.

1934 Q. How many employees were there in the company about that time? A. I believe there was about seven.

Testimony of Arlow Hutson

Q. About seven men? A. Yes, sir.

Q. Did you authorize anybody to sign you up in the union before 1955? A. No, sir.

Q. At Phillips Brothers? A. No, sir.

Q. Did you authorize anybody to make a contract as a collective bargaining agent for you with the company? A. No.

Q. In 1955 did you join the United Mine Workers? A. Yes, sir.

Q. Were you employed by the Phillips Brothers then? A. Yes, sir.

Q. What were the circumstances under which you joined the union at that time? A. You mean how come me to join?

Q. Yes. A. One of the men of the company come to me and told me he wanted me to go over on Monday morning to get signed up to go back to work.

Q. Can you recall any incident that had happened 1935 in that period of time the man came and told you to join the union? What had been going around in the coal fields at that time? A. Nobody hadn't come to me before that.

Q. Nobody had come to you before. Who was it, Mr. Phillips? A. Yes. Burse Phillips.

Q. Burse Phillips? A. Yes.

Q. Was this about April, '55? A. It was April—some time in April, '55.

Q. And at that time did you know why he wanted you to join the union? A. He said he looked like we had to join the union? A. He said looked like we had to join if we got to work.

Q. And what happened then after he told you that? A. We went over and signed up.

Q. Whereabouts was it? A. Pioneer.

Q. At the tipple? A. Yes, tipple there, and a little shack they had built.

Q. Who all was there when you did that? A. There was

Testimony of Arlow Hutson .

myself and brother, Richard A., and Fred Burnett, and Willard Gord, and—

1936 Q. Well, the employees were all there? A. Yes.

Q. Who else was there? A. Mr. Maddox and Ed Daniel.

Q. Was Mr. Raymond Phillips around at that time? A. Yes, sir.

Q. What about Mr. Pennington and Mr. Burse Phillips? A. Yes, sir, they were there.

Q. Now had you a hospital card with the UMW Welfare Fund before that time? A. Not since '52.

Q. And not since '52? A. No, sir.

Q. And between 1952 and this time in 1955 you did not have a welfare fund card? A. No.

Q. Did you have a welfare fund card after that meeting at the tippie when you joined the union? A. Yes, sir.

Q. How long after it? A. About two weeks.

Q. Now Mr. Hutson, when did you leave the Phillips Brothers Coal Company employment? A. October, 1937 1955. Yes, 1955.

Q. And where did you go to work then? A. Laddie Coal Company in Scott County.

Q. Scott County? A. Yes.

Q. Are you still employed there? A. Yes, sir.

Q. Are you working now? A. No, sir. We are off right now.

Q. What is the trouble? A. They claim they ain't got no orders.

Q. No orders? A. Yes.

Mr. Rowntree: You may ask him.

By Mr. Rowntree:

Q. Mr. Hutson, one more question. Before April, 1955, did you know the Phillips Brothers Coal Company had a contract with the United Mine Workers? A. No, sir.

Testimony of Richard A. Hutson

1939

RICHARD A. HUTSON

called as a witness by and on behalf of the defendants.

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DIRECT EXAMINATION

By Mr. Robertson:

Q. This is Mr. Arvin Hutson? A. Richard Arvin Hutson.

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Q. Have you worked for Phillips Brothers Coal Company? A. Yes, sir.

1940 Q. When did you start working for Phillips Brothers? A. August 31, 1953.

Q. Had they been in operation long at the time that you went to work for them? A. A short time.

Q. Had you had any experience in mining coal prior to your going with Phillips Brothers? A. Yes, sir.

Q. Where did you work in mining before you went to work for Phillips Brothers? A. I worked for the Red Jacket Coal Company of Brimstone, and later they changed names and called themselves Glen Mary Coal Company. And then during these periods I was in the service and worked for the Royal Blue Coal Company and Laxton Coal Company.

Q. Was the Royal Blue, is that Blue Diamond Coal Company? A. Yes, sir, it is.

Q. Were you a member of the United Mine Workers during the times that you worked for these other coal companies? A. Yes, sir.

Q. At the time you went to work for Phillips Brothers were you a member of the United Mine Workers? A. Yes, sir.

Q. Did any one connected with the company inquire of you as to whether or not you were a member of the United Mine Workers? A. No, sir.

Testimony of Richard A. Hutson

Q. Did you have a hospital card — a UMW hospital card at the time you went to work for them? A. Yes, sir, I did.

Q. Did you know whether or not they had a UMW contract at the time you went to work? A. No, sir.

Q. Did you keep your hospital card during the entire period that you worked for Phillips Brothers after you went to work for them or did you turn it in? A. Turned it in.

Q. Did the union call it in, or how did you happen to turn it in. A. I was told because I was going to work at a non-union mine.

Mr. Rayson: We object to that. He hasn't identified anybody as speaking or the place or anything else, and we object to it.

The Court: Overruled. That is not competent evidence of what was told him was so, or proving the fact of 1942 what was told to him, but that is competent to show why he turned his card in. And the objection is overruled with that explanation.

Go ahead.

By Mr. Robertson:

Q. Do you recall who called it in, or in what form you got the notice, whether somebody told you or whether you got a letter from somebody telling you to turn your hospital card in? A. On that occasion, I don't remember, but I do know it was told us to turn them in. I don't remember who told us.

Q. You were not paying your dues at that time? A. Yes, sir, I was.

Q. At the time you went to work for Phillips Brothers? A. Yes, sir.

Q. How about after you went to work for Phillips Brothers, did you continue? A. No, sir. I quit paying.

Q. Do you remember when you turned your hospital card in? A. No, sir, I do not.

Q. Do you remember approximately? A. Couple months,

Testimony of Richard A. Hutson

anyway, after I went to work there.

1943 Q. Did you finally join the United Mine Workers after you went to work for Phillips Brothers? A.

Yes, sir.

Q. Do you recall when that was? A. Not the exact date, but it was in the spring of 1955.

Q. What was the occasion for your joining the United Mine Workers at that time? A. Would you explain that please?

Q. Well, why did you join the United Mine Workers at that time? A. Well, it was to so we could go back to work.

Q. Were you shut down at that time, were you? A. Yes, sir, we was.

Q. Why were you shut down A. Well, it was — at that time there was what they call a roving mob went through the country and it scared us out from work.

Mr. Kramer: Your Honor understands we are continuing our objection without making it specific.

The Court: Yes, sir.

Q. Were you working at the time, on the job, when the roving mob shut the mine down? A. You mean shut the mine that we were working down?

1944 Q. Yes. A. Mister, I didn't see them.

Q. I see. A. All I have got is hear talk on that now.

Q. Were you on the job any place else? A. Yes, I was on the job working when we got the news.

Q. Where were you, up at the pit? A. Yes, sir, I was.

Q. Were you notified that you were to close down, to come down off the hill? A. I was told to come off the mountains.

Q. Did you go any place and see anything after you shut down? A. Yes, sir, I did. We heard of this what they call a roving mob, or a mob, and we went to a place called "Newcomb" or "Yokum" — called Newcomb maybe it is.

Q. Newcomb? A. Newcomb, I believe it is. We went to this place, or started rather and we seen a bunch of cars.

Testimony of Richard A. Hutson

So we decided we had better not go on and turned around and went back.

Q. You say "we". Do you recall who all? A. Buster Phillips—I beg your pardon, please. Burse Phillips, one of the deceased operators and a man by the name of 1945 Lloyd Dale.

Q. Was Lloyd Dale employed by the Phillips Brothers at that time? A. Yes, sir, he was.

Q. Do you remember what mine this was where you saw this caravan?

A. No, sir, I did not.

Q. Were you approached by any representative of the United Mine Workers prior to signing up in 1955 about joining the United Mine Workers? A. You mean before time?

Q. Before this occasion on which you signed up. A. No, sir.

Q. No one approached you? A. No, sir.

Q. What was the occasion? How were you notified about signing up? A. By one of the deceased brothers of the operation, Burse Phillips. 1946

Q. And where did this take place? A. At his store. At Robins.

Q. And where did you sign up? A. We signed up at Pioneer, a little shack over there near the tippie where we worked.

Q. Were all the employees there on that occasion? A. Yes, sir.

1947 Q. Who else was present other than yourself and the other employees, do you recall? A. Please state that again.

Q. Do you recall who was there at the time that you signed up other than yourself and the other employees? A. Well, it was two men we call operators. Buster Phillips and Jim Pennington and —

Testimony of Richard A. Hutson

Q. Is that Mr. Raymond Phillips? A. And Buster Phillips. I call him Buster.

Q. And who else? Anyone else? A. On the occasion we signed up?

Q. Yes. A. Mr. Ed Daniel and Maddox.

Q. What took place there on that occasion at the meeting?

A. We just signed up and went back to work.

Q. Were any of the partners in this business in that meeting? A. Yes, sir.

Q. Did they sign up? A. Yes, sir.

Q. Who were they? A. Buster Phillips and Jim Pennington.

Q. Did you go back to work pretty soon after you signed up? A. Yes, sir, I believe we went back to work the 19th next morning after that.

Q. Did you have any more trouble after that? A. No, sir.

Q. Mr. Hutson, at the time that you signed up with the United Mine Workers, what was your understanding as to whether or not you could receive hospitalization and other benefits from the United Mine Workers Welfare Fund?

Mr. Rayson: Your Honor, we object to what his understanding was. We think it is immaterial and certainly would be incompetent for him to express what his understanding was. His mental attitude would not be competent.

Mr. Robertson: Your Honor, it is our contention that the union has fostered the idea throughout the area that you must be a member of the United Mine Workers in order to receive benefits.

The Court: First, ask him if he had any understanding. By Mr. Robertson:

Q. Did you have any understanding, Mr. Hutson? A. That we must sign up before we get the card?

Q. Yes. A. Yes, sir, I knew that.

Testimony of Ralph Phillips

Q. Are you a member of a union now? A. Not of 1949 the United Mine Workers.

Q. Are you a member of any other union? A. Southern Labor Union.

Q. When did you sign up? A. September 16, 1959, I believe.

Q. Have you continued to work for Phillips Brothers since they had to reorganize the corporation? A. Yes, sir.

Q. The latter part of '58? A. Yes, sir.

Q. What were you doing at Phillips Brothers? What was your job at the time that you started working for them? A. Cleaning coal, labor.

Q. What were you doing the last time you worked? A. Operating a 'dozer.

Q. What were you making at the time you started 1950 in 1953? A. One dollar an hour.

Q. How much are you making now? A. Two and a quarter.

Q. How are employment conditions in your area? A. They are very poor right now.

RALPH PHILLIPS

called as a witness by and on behalf of the defendants.

DIRECT EXAMINATION

By Mr. Rowntree:

Q. This is Mr. Ralph Phillips? A. Yes, sir.

Q. Are you any relation to Raymond E. Phillips? A. Not that I know of.

Q. Or Burse Phillips? A. No.

Q. Are you an employee of Phillips Brothers Coal 1951 Company at the present time? A. Yes.

Q. That is the corporation? A. That is right.

Q. Were you an employee of the partnership back be-

Testimony of Ralph Phillips

fore 1958, Phillips Brothers Coal Company? A. Yes, sir, I was employed before that.

Q. Speak up a little bit so we can hear you. A. I was employed in '55.

Q. 1955 by Phillips Brothers Coal Company? A. Phillips Brothers Coal Company.

Q. Do you recall what time of year it was? Was it in the early part or late part of '55? A. When I was employed?

Q. Yes. A. It was February 2, 1955.

Q. Were you employed in the coal business before you went to work for Phillips Brothers Coal Company? A. Yes, sir, just small mine, wagon mine.

Q. Small mines around Scott County? A. Scott County.

Q. Were you a member of the United Mine Workers? A. Well, I actually wasn't a member, I just signed one time and that is as far as it went. Sort of a charter thing. I didn't have no member — didn't have a card.

1952 Q. Was that some time before you went to work for Phillips Brothers? A. Yes, sir, quite a bit.

Q. In April 1955 were you working for Phillips Brothers? A. Yes, I was working for them.

Q. Did the mine close down in that month? A. They closed down. I don't remember exactly which month.

Q. Was it in the spring of 1955? A. Yes, sir, I think it was, the spring.

Q. Was it a short time after you went to work for Phillips Brothers? A. I went to work in '55 and we shut down, that was about a couple of months or two, a short time.

Q. What were the circumstances under which the mine closed? A. Well, the union.

1953 Q. Why? A. The union in other words, we had trouble and shut down—when they went to organize is why we quit.

Q. Did you know at that time that there was a contract between the company and the union? A. No, sir.

Testimony of Ralph Phillips

Q. And you were not a member of the United Mine Workers? A. No, I wasn't a member.

Q. Had you authorized anybody to sign a contract for the employees of the company with the company? A. No, sir.

Q. Now after you closed down, did you in that period of time join the United Mine Workers? A. Yes.

Q. Under what circumstances did you join? A. Well, just joined it to get to go back to work. It was join or not work.

1954 Q. Did somebody come to see you to tell you to come to the company? A. What was that?

Q. How did you come to go down and sign up? A. Well, just — well, we just had to sign — we had word — well, Buster Phillips told us we had to sign it or quit, we couldn't work.

Q. Was Buster Raymond E. Phillips? A. Yeah, I seen him, and that was the only way to go back to work.

Q. And did you have a meeting of the employees at the tippie? A. We only had a meeting when they come there to sign us up on this here, ever what their names was, we met there and joined, and went back to work.

Q. Can you state whether or not that was Mr. Daniel and Mr. Maddox? A. Daniel was one of them. I don't remember the other one.

Q. And you did sign up yourself? A. Yes.

Q. Had you had a hospital card from the Welfare Fund before that time? A. No.

Q. Did you get a hospital card after that time? A. 1955 Shortly after that I got one.

Q. And you signed at that time your check-off card? A. Yeah.

Q. For your dues to be paid? A. Yes.

Q. Mr. Phillips, do you remember what wage you were paid when you went to work for Phillips Brothers Coal Company? A. Dollar and a half an hour.

Testimony of Ralph Phillips

Q. Was your wage later increased? A. Yes, sir.

Q. What kind of operator were you, or what work did you do? A. I was a dozer operator.

Q. And what salary did you later make with the company? A. Two and a quarter.

Q. And did you change jobs after that? A. Yeah, I changed again and raised again.

Q. To what salary? A. Two and a half.

Q. Had you had any change since that time? A. Not an increase. In other words, I'm getting salary pay now.

1956 Q. What is your present job? A. Now?

Q. Yes. A. Foreman.

Q. Let me ask you, Mr. Phillips, are you a member of the United Mine Workers at the present time? A. No, sir.

Q. Do you have qualifications to receive any benefits under the Welfare Fund at the present time? A. During what time I had my card?

Q. Afterwards. A. No, not afterwards.

Q. After you stopped being a member? A. No.

CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Phillips, your company isn't under contract with the United Mine Workers now, is it? A. Not now, they aint.

Q. It's under contract with some other union? A. Yeah.

Q. And it has been for sometime, isn't that correct? A. Yeah, it's been sometime.

1957 Q. And you haven't had your card since your company has been under contract with another union, isn't that right? A. You mean the UMW card?

Q. You haven't had your hospital card since your company has been under contract with another union, isn't that correct? A. I have one card from the other union, but not from the United Mine Workers Union. I don't have it.

Testimony of John Amos

Q. You have no hospital card now from the United Mine Workers Union? A. No, sir.

Q. And you have not had that card since your company signed up with the other union? A. No, sir.

Q. Is that right? A. That's right.

Mr. Rayson. That's all, Your Honor.

1958

JOHN AMOS

having been previously sworn, resumed the stand; and testified further as follows:

CROSS EXAMINATION

By Mr. Kramer:

Q. Mr. Amos, you have — well, the Love and Amos Coal Company that you spoke about the other day, is that a corporation or a partnership? A. A corporation.

Q. And it has been a corporation for some years? A. Since the inception, yes, sir.

Q. Love and Amos Coal Company has never been an operating company? By that I mean a company that mined coal and produced coal from the ground? A. No, sir.

Q. Love and Amos Coal Company has been a sales company always? A. That's correct, yes, sir.

Q. In other words, you have bought coal from the producers and sold it into the market somewhere? A. Yes, sir.

Q. You have sold it to utilities or you have sold it elsewhere, wherever you could find a market for it? A. That's correct.

Q. Now the principal office of the Love and Amos Coal Company has been at Nashville for some years? A. Yes, sir.

Q. There's been a good deal of controversy between Love and Amos Coal Company and the United Mine Workers of America, hasn't there? A. No, sir, not between Love and—

Q. Not to amount to anything? A. Not between Love and Amos and the United Mine Workers that I know of.

Testimony of John Amos

Q. You don't know of any controversy there's been at all? A. No, sir.

Q. Never been any controversy between — A. Yes, sir, there's —

Q. Wait a minute. Never been any controversy that you know of, as I understood your answer, between Love and Amos Coal Company and the United Mine Workers of America. Is that what you mean to tell this Court and this jury? A. I overlooked the fact that Love and Amos was a plaintiff in this Court in 1958 against the United Mine Workers?

Q. When you swore a while ago, you also overlooked the fact that not only were they a plaintiff in this Court in 1958, but also in the United States Circuit Court of Appeals in Cincinnati. A. That was this same case.

1960 Q. And you also overlooked the fact that about three months ago or a little less that the Love and Amos Coal Company instituted a suit in the state court at Nashville. A. That's the same case.

Q. That is not the same case, but a new case involving some of the same questions. A. Well, it is —

Q. It's another lawsuit that was started in Nashville? A. It was the same case that was originated in this Court, and the Court of Appeals, as I understood, Love and Amos was thrown out of the place on the grounds that they have instituted it in the wrong Court, and —

Q. In other words, the Court of Appeals at Cincinnati said that that suit couldn't be maintained in the Federal Court, and then you people later started another suit and it is now pending, awaiting trial against the United Mine Workers of America in the state court in Nashville, isn't that right? A. Yes, sir, that's right.

Q. And in that case, Love and Amos is claiming damages off of the United Mine Workers? A. That's right.

1961 Q. And the fact that you said a while ago you didn't realize there was any controversy between them, you testified at great length when we tried that case,

Testimony of John Amos

or it was tried in this Court before His Honor two and a half years ago. A. Yes, sir. When you asked that question, I was thinking about any controversy between United Mine Workers, operating controversy, and Love and Amos.

1962 Q. You are claiming, without going into any details, substantial amounts of money presently for Love & Amos Coal Company against the United Mine Workers? A. That is correct; yes, sir.

Mr. Kramer: Yesterday there was introduced, your Honor, Exhibit 113 and from Exhibit 113 certain charts were prepared. This is the one that somebody talked about being the Bible in the industry.

And from that exhibit, your Honor, this chart, which I believe is 115, they stated was prepared, and on Exhibit 115, at the righthand end over here, is a series of names of six states—New York, Pennsylvania, Illinois, Ohio, Indiana and Tennessee — showing coal produced for utility use in tons and the cost—sales price, in other words—per ton is shown on that exhibit.

Your Honor, from the same exhibit, which is 113, we have prepared also some charts which I want to introduce here as Exhibit 123.

This exhibit is titled, "Supplementary Summary Chart of Exhibit 113." It really ought to be "Supplementary Summary Chart of Exhibit 115."

(Exhibit No. 123 was marked for identification and filed.)

Mr. Kramer: On the exhibit that is on the board —

In this chart, or graph, whatever you want to call it, that table that was introduced on yesterday, the Court
1964 and jury will note that the six states which had the highest cost of utility sales of coal for utility purposes was given, and Tennessee was given as a sales price

Testimony of John Amos.

on 9,351,000 tons, \$4.81 a ton. And we are talking about 1957.

We have taken this chart, your Honor, or this exhibit rather — this one here Mr. Rayson has in his hand — and from the same page from which these figures were produced — we have produced the additional figure to show what the sales price of coal was not only from New York, Pennsylvania, Illinois, but from the neighboring states of Tennessee. And the jury has in their hands, your Honor has in his hand, this exhibit showing the sale for Tennessee for the 9,351,000 — that “9” isn’t too clear to me, looks like a “4” but it is the same as the 9,351,000 if you haven’t got a clear one — it is \$4.81, which is the last item on this table or Exhibit 115.

Our neighboring state of Alabama, according to this same record put in on yesterday, had a sales price of 10 cents less, \$4.71.

Our neighboring state — practically neighboring — of West Virginia had a sale to utilities of 6,296,000 tons in the year 1957, and its price for sale for utility purposes is still lower, \$4.29.

1965 Our other neighboring states, coal producing states, Kentucky sold for utility purposes during the year 1957, 6,687,000 tons and the price of the coal sales in the State of Kentucky was \$4.25. That is what this table shows, your Honor, taken from the same exhibit.

Counsel asked about adding something to it.

Mr. Rowntree: Yes, sir. Of course, it is our position that Alabama has two of these TVA plants and the depressed price would occur in Alabama just like it would in Tennessee.

Mr. Kramer: Your Honor, — pardon me.

Mr. Rowntree: The depressed price of utility coal would occur in Alabama just like it did in Tennessee.

Mr. Kramer: I call attention, your Honor, that there isn’t a TVA plant within hundreds of miles of West Vir-

Testimony of John Amos

ginia and West Virginia has a price of \$4.29 and TVA markets in West Virginia would not be depressed for TVA coal.

Mr. Rowntree: And we point out, your Honor, that West Virginia had a tonnage, or production tonnage compared with those figures up there, of 156,842,038 tons in 1957—156,842,038 tons produced in West Virginia in 1957.

Kentucky had a production in 1957 of 74,666,796 1966 tons.

Mr. Kramer: I did not catch the figures that counsel gave for West Virginia?

Mr. Rowntree: West Virginia, 156,000,000 tons.

Mr. Kramer: I gave the corresponding figures for the highest states. I just point them out so the jury may see it. By Mr. Kramer:

Q. Mr. Amos, in the sale of coal for utility purposes, you sell what we generally, or what you people generally call in the coal market as steam coal? A. Yes, sir.

Q. What is the classification of coal that bears usually the highest price in the sale; how do you classify it? A. Block coal would bear the highest price in most of the markets that I am familiar with.

Q. Block coal, and then there is another graduation between block coal and steam coal or the fine coal; what is it?

A. Some mines make five or six or more grades of coal out of the mine run that comes out.

Q. When you say "mine run" you mean the coal just as it comes out of the mine? A. Yes, that's right, as shot from the face.

1967 Q. And in order to get a better grade coal, like the block coal, you separate it out so as to sell it at a higher price? A. That's right.

Q. And that is generally done on all coal that is sold for steam purposes, the block coal, the higher priced coals have been taken out? A. No, sir. It has gotten down to where

Testimony of John Amos

the only domestic size are taken from the high grade seams, as far as I know.

Q. Some of the seams in Tennessee are high grade seams, you told us yesterday? A. That is right; yes, sir.

Q. You told us yesterday you thought the seams of coal in Tennessee were the equal or superior to seams in many other locations? A. That is correct; yes, sir.

Q. So that the teams in Tennessee do have this so-called high grade coal that is eliminated before the steam coal and utility coal is taken out, don't they? A. They did have, Mr. Kramer, but the markets are gone for those grades of coal.

Q. In 1956 and 1957 the markets were not gone, were they?

A. Yes, sir.

1968 Q. They were beginning to lower but there was still a substantial market for block coal in 1956 and 1957, wasn't there? A. I wouldn't say substantially. There still is some market, understand, but it has been decreasing each year.

Q. Yes. Now in the sales that Phillips made to various purchasers, do you know what they did about grading coal and classifying it? A. No. I have never been to their mine.

Q. Do you know anything about the grade of coal that they sold to the TVA or other sales they made? A. No, sir, I do not.

Q. You never been at their mine at all? A. No, sir.

Q. You told us yesterday, as I recall it, that in some of the shipments to Tampa, in a series of shipments to Tampa, in filling the contract you had with Tampa, some 4,000 tons came from Phillips Brothers mine? A. I don't think I said that because I don't know how much —

Q. You don't know whether any came from — A. There was some —

Mr. Rowntree: That was my statement. I read from the record in the case.

1969 Mr. Kramer: I stand corrected, but it is in the record here somewhere, your Honor.

Testimony of John Amos

By Mr. Kramer:

Q. You did not know, and you don't know what the coal they shipped was, a ton or what, in fulfilling the contract?

A. No, sir. I bought that coal from Royal Fuel Company, and they told us where the coal was coming from and we had some one of our crew go in there and sample some of the coal to see that it was.—

Q. But you, yourself, had nothing to do with that? A. No, sir, I did not.

Q. I take it from what you have just said that all of the sales, or all of the purchases that you made in handling Phillips Brothers coal were made through Royal Fuel? A. That is correct. Yes.

Q. In other words, it was brokered ~~twice~~. Brokered through you—or, I mean, brokered through Royal Fuel to you and then through you to Tampa? A. That is correct.

1970

REDIRECT EXAMINATION

By Mr. Rowntree:

Q. Mr. Amos, I refer now to Exhibit 97, tabulations of Royal Fuel Company, with respect to sales made for Phillips Brothers Coal Company, the sale to Love & Amos for Tampa, Florida, July 21, 1958, with a gross price of \$3.75, a net price to Phillips Brothers Coal Company of \$3.50, and I believe you have indicated on cross examination that you had a brokerage fee on top of the \$3.75? A. That is right, yes, sir.

Mr. Rowntree: We would like to file as the next exhibit a page of the United Mine Workers Journal, page 13, July 15, 1954.

(Exhibit No. 124 was marked for identification and filed.)

Mr. Rowntree: This page sets forth awards made
1971 by TVA to coal producers for the purchase of coal
by TVA and states "List of Awards, Coal Invitation

Testimony of John Amos

to Bid—Requisition 17/808325." It gives the name of contracts, the contract term in months, the tons to be shipped per week, the shipping point, the method of transportation, the bid price, the transportation cost and the plant price.

This lists some 20 companies who sold coal to TVA on these awards, the awards being on June 4, 1954 for delivery to Kingston and also awards of June 28, 1954 for delivery to Kingston.

I will read down through the bid prices, the transportation costs and the plant price.

The first seller, \$4.50 bid price, with no transportation cost. Therefore, the plant price would be \$4.50.

The next seller, \$4.70, and the plant price was \$4.70.

The next seller, \$4.55, and that is the same price at the plant.

This is the Kingston plant at Kingston, Tennessee.

The next seller, bid price \$3.48. Transportation cost is \$1.07. Plant price \$4.55.

The next seller, \$3.05 bid price. Transportation cost 1972 the same, \$1.07, and all the rest of these will be \$1.07, transportation. In fact, I will omit the plant price because they will all have the same addition of transportation cost of \$1.07, and proceed to read the bid price that is f.o.b. mine.

The next seller is \$3.57 at the mine.

Next \$3.52.

Next \$3.35.

Next is \$3.50.

Next is \$3.52.

Next is \$3.60.

The next is Love & Amos Coal Company, coal to be shipped from Jellico, Tennessee, \$3.75.

Next \$3.28.

Next \$3.85.

Next \$3.35.

Next \$3.50.

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Next \$3.60.

Next \$3.55.

And there is one more at the bottom, \$4.48, delivered at the plant. That is Watts Bar; that last one.

Now there is a statement underneath this that says—this is from the United Mine Workers Journal: 1973 “Evidence that TVA is still pursuing its short-sighted and dog-eat-dog policy of buying coal, is offered by the latest contract figures of coal bids awarded in early June for delivery to the Kingston, Tenn., plant. Analysis of the coal awards above, most of which went to non-union companies and brokers who buy from small dog-hole mines that do not observe union wages, hours, welfare or conditions, and also disregard state and federal safety codes and the Walsh-Healey Act, shows how the TVA coal purchase policy operates.

“Note the low prices of coal at the mine which even after transportation costs are still below the prices quoted by established operators and generally recognized as standard prices for the industry. Some of the coal to fill these orders is so-called ‘distress coal’ which the brokers pick up from established operators who have a temporary surplus due to the fact that they are unable to obtain TVA business on legitimate terms.

“In this particular award list, transportation is mostly by rail and barge, with only three listing truck delivery ...”

By Mr. Rowntree:

Q. Mr. Amos, would you agree that that was a 1974 low price for steam coal? A. Yes, sir.

Mr. Rowntree: I would like to read into the record a statement by Mr. Lewis taken from the United Mine Workers Journal, February 15, 1955, a statement made in the course of the hearing on the Walsh-Healey minimum wage in that year.

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Testimony of John Amos

1975 Mr. Rowntree: This statement of Mr. Lewis, quoting:

"Lewis said that because of TVA policy private electric utility companies 'have found it necessary to follow to some degree the same procedures of destructive buying of coal as TVA.'

"Lewis said there is no other industry in the nation 'where the influences of competition are so delicately balanced and so ravaging and destructive in their effect when the balance is disturbed.' "

By Mr. Rowntree:

Q. Mr. Amos, do you recall the exhibit with respect to large tonnage bids of West Kentucky and Nashville Coal Company on the spot coal market of TVA? A. Yes, sir.

Q. Would you agree with this statement of Mr. Lewis that I have read? A. I most certainly do.

1976 Q. With respect to this statement, does that statement of economic circumstance result in any effect on markets adjacent to the TVA? A. Yes, sir, it does.

Q. What specific markets were available to Phillips Brothers Coal Company in the period 1956 through 1958 for this steam coal? A. Well, the power companies in the Carolinas were available and the power companies in Georgia were available and that is about all, according to my recollection, that was available at that time.

Q. And was the Tampa market a market subsequent to that time? A. Yes, sir, but, of course, that wasn't adjacent to TVA.

Q. Would a depreciation of the TVA market have an effect on the markets of those adjacent power companies?

A. It always has, yes, sir.

Mr. Rowntree: That is all.

RECROSS EXAMINATION

By Mr. Kramer:

Q. Counsel has read to you a moment ago, Mr. Amos,

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an article, part of an article in the United Mines Workers Journal—I have forgotten the date—but just a few 1977 minutes ago, in which Mr. Lewis is quoted as criticizing TVA's pricing policies. If I recall correctly, in some of this litigation that we have had, that Love & Amos Coal Company ran full page advertisements in the daily papers criticizing TVA's coal pricing policies, didn't it? Isn't that true? A. I don't recall.

Q. You mean you just don't remember or it didn't happen? A. I don't remember. I don't remember that they were criticizing their coal buying policies, but they might have been, because they were subject to criticism, I think. I agree with Mr. Lewis thoroughly about it.

Q. What I am saying, he had an article in the Wall Street Journal and you had an article in daily newspapers criticizing TVA's buying policies and pricing policies? A. That has been some time ago and I don't remember just what we were criticizing. I am not trying to say—

Q. You were criticizing some way? A. I would criticize all right.

1978 Mr. Rowntree: If Your Honor please, we have a few odds and ends we would like to finish up here.

The Court: All right, sir.

1979 Mr. Rowntree: This exhibit exhibited by the opposing counsel, Exhibit 107, contains figures showing BTU cost at the plant, 1954, and 1955. The witness I. E. Schmidt was examined with respect to this exhibit pointing out the low cost of TVA coal, 1954 and 1955.

I want to read from Exhibit 113—

Mr. Rowntree: This is page 89 of Exhibit 113.

"Tennessee cost of coal per ton at plant, utility plant, 1951, \$5.34; 1952, \$4.89; 1953, \$4.76; 1954, \$4.59; 1955, \$4.42; 1956, \$4.63; 1957, \$4.81; 1958, \$4.79."

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So the two lowest years in cost of coal were these years 1954 and 1955.

I would like to inquire of counsel if there can be a stipulation that the union, under its constitution, had the power to make special assessments on its membership.

Mr. Combs: Well, Your Honor, we would refer 1980 to the constitution on that section, No use to stipulate, it is very clear.

Mr. Rowntree: The dues provision of the Constitution of the International Union, Section 11, Article XIV:

"The local union dues to be paid by each member shall not be less than \$4.25 per month, \$51.00 per year, to be divided as follows: \$1.25 to be retained or sent to the local union; \$1.00 to be retained by the District organization; and \$2.00 to be forwarded to the International Secretary-Treasurer, together with such assessments as may 1981 be levied by the different branches of the organization."

Mr. Combs: We stipulate that, Your Honor, that this was in force at the time pertinent herein.

The Court: Good.

Mr. Rowntree: We have page 7 of the United Mine Workers Journal, January 15, 1957, which we offer as next exhibit.

(Exhibit 125 was marked for identification and filed.)

Mr. Rowntree: We would like to offer as next exhibit, Page 8, United Mine Workers Journal, July 15, 1957.

Mr. Kramer: What portion of this? All of it or just a part of it or what do you see in here?

Mr. Rowntree: The letter.

Mr. Kramer: Your Honor, we object to this, it is not an official pronouncement of the union or the officers of the union. It is an outside matter that is copied in the Journal.

Mr. Rowntree: We put it in for the purpose of showing

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that the union International officers had notice of the conditions in this section of the country.

Mr. Kramer: Well, I take it it is a matter of general knowledge there was unemployment in many areas 1982 of the United States, very few industries operating at full capacity today.

The Court: Is that the only purpose it is offered?

Mr. Rowntree: Yes, sir.

The Court: It may go into the record for that purpose only.

(Exhibit 126 was marked for identification and filed.)

Mr. Rowntree: This exhibit reads as follows:

A letter published in the United Mine Workers Journal—

Mr. Kramer: What number is that?

Mr. Rowntree: 126.

The Court: Remember that doesn't go into the record as to the truth of its contents, but it goes into the record solely on the alleged notice to the union on the alleged depressed working conditions in the Campbell County area.

Mr. Rowntree: It is addressed to Mr. John L. Lewis:

"Dear Sir:

"Local Union No. 3295, Jellico, Tennessee, is asking you for your influence, individual, financial, and as President of the United Mine Workers of America for 1983 help to secure employment in Campbell County, Tennessee, and Whitely County, Kentucky—as there are members in both counties in our Local.

"Campbell County . . . has about 2,200 miners out of work."

The Court: Now that doesn't go to prove that Campbell County had 2,200 people of work, but goes, as indicated, to bring home notice to the union of alleged depressed conditions.

Go ahead.

Mr. Rowntree: "A large part of this number have re-

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ceived all their unemployment benefits. Whiteley County . . . is in about the same condition.

"The only employment in the above-named counties is in dog holes and strip mines with a small per cent paying contract price. When a man who belongs to the United Mine Workers starts looking for a job here, he is just like a man without a country.

"The U. S. Bureau of Mines states there is as much coal in this section as has been mined. But we think the small companies have not got the capital to mine it because they are not doing it.

"There have been a few small manufacturers talked of moving here. But they ask the citizens to finance the 1984 manufacture and there is not enough capital in the hands of the working people . . .

"We, as members of the UMW of A. need work for our families and ourselves. We do not want to lose our membership in the UMW of A. We have struggled to hold our union . . ."

It is signed by Raymond Douglas, president; the vice-president, and by the recording secretary, and by the treasurer.

Mr. Combs: May it please the Court, as a matter of clarification to the jury, this letter appears on the editorial page of the United Mine Workers Journal under date of July 15, 1957, and it is captioned, "A Plea to Congress for Help."

It reads thus:

"United Mine Workers of America, Local Union 3295, Jellico, Tennessee, recently wrote to President John L. Lewis asking his help in getting action in Congress on legislation to aid depressed areas. We think the mem- 1985 bers of Congress ought to know what the officers and members of Local Union 3295 have to say on this vital subject; so we are reprinting the letter herewith."

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Then follows the letter. And after the letter then continues the editorial part.

"The letter asks that Lewis contact Sens. Estes Kefauver (D. Tenn.), and John Sherman Cooper (R., Ky.) and Reps. Howard Baker (R., Tenn.) and Eugene Siler (R., Ky.).

"It was signed by Raymond Douglas, president; Bill Prewitt, vice president; Clyde Thomas, recording secretary; Hobert Creekmore, financial secretary, and Earl E. Brown, treasurer, Local Union 3295."

It closes with this observation:

"We wonder what Congress will do about such conditions."

And I might say, the Depressed Areas Bill did pass the Congress and was signed by the President.

The Court: All right.

1989 Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, with respect to the contracts between United Mine Workers and the operators, we rely upon the following parts of the National Bituminous Coal Wage Agreement commencing with the agreement of 1947. This is page 57. The language:

"It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, except in those exempted classifications of employment as hereinafter provided in this Agreement."

And the similar language appearing in subsequent contracts with modification occurring first in 195, adding the clause "to the extent and in the manner permitted by law," which occurs on page 80.

The language in the 1947 contract, page 61 et seq., with regard to the Welfare and Retirement Fund. I suppose I ought to read these portions.

1990 Pages 61:

"It is hereby stipulated and agreed by the contract-

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ing parties hereto that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund.' During the life of this Agreement, there shall be paid into such Fund by each Operator signatory hereto the sum of ten cents (10c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America, and one of whom shall be a neutral party selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

"The Operators signatory hereto do hereby appoint 1991 Ezra Van Horn of Cleveland, Ohio, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that the aforesaid two Trustees shall with all dispatch designate and name a third and neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

"In the event of a deadlock on the designation or agreement as to the neutral Trustee, or any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the

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District of Columbia for the appointment of such an impartial umpire, all as made and provided in section 302 (c) of the 'Labor-Management Relations Act, 1947.'

"It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper 1992 continuation and administration of said trust shall require.

"It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness, resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or state law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,' as agreed upon from time to time by the trustees, including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of 1993 America and their dependants; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947,' subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947' and other applicable law, with respect to questions of coverage and

